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ABSTRACT

Following introductory material, four monographs on collective bargaining are presented. The first, the strategy and tactics of collective bargaining, offers valuable suggestions as to how negotiations should be conducted and concludes on a positive note arguing that no clear dichotomy exists between faculty and administrator power. The second monograph deals with the impact of faculty unionism on tenure by analyzing the causes of faculty unionism, discussing the problems that tenure systems create, and finally determining whether or not tenure matters will be negotiable. The third monograph discusses the changing relationship between college presidents and Boards of Trustees; collective bargaining was mentioned as one of the possible factors having influence on the relationship. The fourth monograph examines and analyzes the state public employment statutes with recommendations for statutory treatment of institutions of higher education. (MJM)

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Collective Negotiations in Higher Education

Edited by MICHAEL BRICK

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INTRODUCTION

Since 1960 the Community College Center at Teachers College, Columbia University, has been deeply involved in improving the administration and instruction at community colleges. In addition to conducting research and offering consultation services, the work of the Center has had five primary thrusts: an annual Summer Work Conference; a continuing series of Administrators Seminars; discipline oriented conferences for faculty; cooperatively sponsored conferences on a variety of educational issues; offering off-campus in-service education programs for community college staff.

Over the last few years, an important theme that emerged from our workshops and conferences is the importance of collective negotiations and their impact on practices in higher education. Believing strongly that collective bargaining, as a force for good or ill in academe, is largely what its practitioners, and their respective constituencies want it to be, the Director of the Community College Center believed that some of the presentations delivered in conferences during the past two years deserved to be read by all concerned with the future of higher education.

The issue of collective negotiations in higher education is very difficult to examine in a productive way. This is primarily due to three factors. First, the issue elicits strong emotions which causes those involved in a discussion about collective negotiations to take sides and preach rather than to analyze. Second, the issue has a tremendous number of different and complex aspects that can be viewed from a variety of perspectives. This, of course, makes it very hard to examine the issue as a comprehensive whole. Third, collective bargaining in higher education is not a stable matter but rather one that changes rapidly even as it is being examined. The result of this trait is that what was applicable six months ago or even last month very often can be inappropriate today. Yet, despite the difficulties, the examination of collective negotiations in higher education must continue and, indeed, I would suggest, be intensified. Quite simply, it is too important a topic to go unexamined.

Basically, collective negotiations is extremely important because of the consequences that grow from it. On one hand there are the consequences that can be measured quite easily: the dollars involved; the salary scales enacted; the student/faculty ratios determined; the course loads established; the elaborate procedures for hiring and firing instituted; the assignments of who can and cannot make a decision. On the other hand, there are the consequences that cannot be measured so easily: the cooperative attitudes enhanced or diminished;

the trust relationships established or destroyed; the innovative ideas encouraged or discouraged; the means for genuine communication opened or closed; the regard or individuality increased or decreased.

In the long run, both of these categories of consequences are important. If the anthropologists are correct, however, in their concepts about how social systems determined behavior then it seems to me that the measurable consequences in the short run will be the more important ones because they embody the items which will structure the social system in which those who populate our educational institutions will live. This is not to say that cooperative attitudes, trust, and innovation are of secondary importance to salary scales and work loads. Rather, it means that the existence and quality of cooperative, trusting and innovative behavior is largely determined by the social system in which people function. For example, if innovative classroom practices make no difference in the way in which peers evaluate each other in a particular social system, then it is highly unlikely that innovation will thrive in such an environment. Likewise, in a social system where a group of men are given rewards on a basis of how well they work as part of a larger team, it is probable that cooperative attitudes will exist between the members of that team. Thus it would seem that those involved in the process of collective bargaining, if they care at all about maintaining viable institutions, must be concerned with the kinds of behavior that negotiations will promote, ignore, or retard.

Now obviously, this responsibility is not one which is easily fulfilled. Nevertheless, I think that there are concepts which make the task somewhat less difficult. First, and this was already expressed above, it would be very productive for those involved in collective negotiations to think of an educational institution as consisting of, among other things, several various codes of behavior that determine what people will most likely do and not do. This way of conceptualizing an organization certainly has many more benefits than thinking of it as a series of boxes stacked in a pyramid. The most obvious asset would be that it would require the negotiator to think of what kinds of behavior he did or did not want on the part of those in the institution and the various ways this behavior could be encouraged or discouraged. For example, let us say that for some reason it was decided that innovative behavior by both faculty and administrators was determined to be highly desirable. Now, once this principle was agreed upon (which in itself might be highly difficult) the problem would then be one of how are codes of behavior established that would foster innovative behavior. Clearly, this would be a tremendously difficult task for several components would be involved to produce such a behavioral code -- to name just a few: job security, financial support, recognition, and time. Yet, I would think that given the concerted attention of a group of administrators and faculty

a reasonable code which would promote innovative behavior could be developed. Moreover, in the process of arriving at such a code for behavior, the bargaining would have to be fairly rational, for each item presented on the bargaining table would have to be supported as contributing toward th accomplishment of a pre-articulated goal. Hence, faculty could not simply demand more money for those involved in innovation but rather would have to show how additional money would enhance the chance of a professor being innovative. Similarly, administrators could not simply say that faculty should be innovative without a guarantee that a failure would not be held against a person in the future.

Let us look at another example of what it would mean to negotiate in terms of codes of behavior. Responsible teaching and administration certainly is one of the phrases frequently tossed around on any college campus. Of course this phrase is rarely defined with any precision. Indeed, if it were it probably would not be used as much. Despite this lack of precision and over-use, it seems to me that responsible teaching and administration is a legitimate goal for any educational organization and, thus, the question is how do you promote it through a process of collective negotiations? First, it can be seen that at present on any campus there is responsible teaching and administration for, in general, any who do not toe the line set by the existing behavioral codes do not long survive in an organization. Thus, the real issue is not achieving responsible teaching and administration but rather promoting certain kinds of behavioral codes that will result in teaching and administrative behavior which is considered to be productive in light of the objectives of the institution. To state this in another way, social science has revealed that every organization has norms which its members follow. Quite importantly, these norms may or may not be in keeping with the stated behavioral expectations of the organization. For example, one of the stated norms of an organization might be that every employee should work steadily with or without direct supervision. However, in opposition to this norm, there may be an organizational code of behavior which expects people to work only when someone is watching them and to do otherwise would be to be a "rate breaker." Now, in such a situation it can be understood that a person who is "slacking on the job" may in fact be doing just the opposite for he is being very responsible in terms of the code of behavior which pertains to him. Hence, to argue for responsible behavior may often be self-defeating for an organization. A wiser path would be to assume that most people are responsible in terms of the codes of behavior in which they live and to change their behavior one will have to change the larger codes. In essence, then, working to change individuals often is a highly inefficient way of improving an organization. Of course this way of perceiving an organization puts a great deal of emphasis on what re-

sults from the collective bargaining process, for it is here that the larger organizational codes of behavior are established. Hence, in response to the question of how does one achieve responsible teaching and administration through the process of collective negotiations, the answer simply must be that one does not achieve responsible behavior through the process, however, and this is a very important however, one can change the codes of behavior that determine what is responsible in the process of collective bargaining and this is what negotiators should be pursuing. Because such changes in behavioral codes affect the very fabric of people's lives one should not expect such changes to come about easily or quickly. Indeed, perhaps one of the greatest benefits of thinking in terms of behavioral codes is that it gives one a sense of the magnitude and difficulty of the task in which he is engaged.

Another concept that might prove productive for those involved in collective negotiation and anxious to foster viable educational institutions is to think of the collective bargaining process as a medium for communication that involves a new and difficult language. In this regard an analogy with the development of film art would be illuminating. When films first were made the camera was held entirely motionless with people and things moving in front of it. Of course, at that time there was no sound or music accompanying the film. Almost needless to say is the fact that these first films were extremely rudimentary and the number of things which they could communicate was quite small. But soon a series of techniques were developed that allowed a great many things to be communicated. For example, the close-up came into use, the camera started to be moved, sound was added, and the art of editing came into its own. Still later, techniques such as color, wide-angle lens, light weight highly mobile cameras, and a host of other artistic and technological advancements made possible the communication of stories and ideas not possible previously. Now, this introduction is not intended to be an article on the history of film art. However, the development of that art gives an insight into the process of communication. When films were young not much could be said in them. Indeed, it was considered a miracle that a moving train could be shown arriving in a station. But as a greater number of techniques for expression were developed, people started to articulate some highly complex ideas and themes in films. In short, it might be said that as the film "vocabulary" grew, men could communicate through that medium a greater and richer number of concepts.

The same can be said of the process of collective bargaining. In my estimation at present there are not many people in the field of higher education that have much of a vocabulary when it comes to the medium of collective bargaining. This is extremely unfortunate because this

lack probably results in the most rudimentary form of communication. Thus, contracts arrived at through the process of collective bargaining contain within them only the roughest sort of concepts expressed in the roughest sort of way. Considering the complexity of today's educational institutions, it would seem that such simplistic expressions would be inadequate for dealing with campus issues. Hence, it would seem wise that today's administrator if he wants to be competent in the area of collective bargaining in higher education should make a concerted effort to develop his collective bargaining "vocabulary". Such a task would not be easy for it is not simply a matter of learning a few new words; rather, it is learning a whole new way of saying things -- just as saying things in films is different than saying things on the radio. Consequently, those undertaking such a project should be prepared to involve themselves in a new language that is both diverse and rich. If this is not done, the chance is run that one will become deaf in an era that requires particularly sensitive hearing to stay alive.

Rutgers President Edward J. Bloustein, in a paper entitled "Collective Bargaining and University Governance," stated that "with effective faculty leadership in collective bargaining, with a contract which preserves the traditional collegial structure in appointment, promotion and academic policy, and with a spirit of goodwill between a university president and the faculty leadership, the polarization will tend to diminsh rather than increase." Of course! The critical fact is, however, that without such faculty leadership, without administrative understanding, without such a contract that preserves academic judgment, policy and governance, without such goodwill, and without the acceptance by both the union and institutions of higher education of fiscal responsibility to the public, collective bargaining may not only polarize higher education, it may well pulverize it.

The following pages, then, are essentially by specialists attempting to offer administrators some insights into dealing with the complicated questions involved in collective negotiations. Joseph N. Hankin, President of Westchester Community College and a member of the Board of Directors of the American Association of Community Junior Colleges, sets the tone of the monograph by offering some valuable insights into the strategy and tactics of collective bargaining. He offers valuable suggestions as to how negotiations should be conducted and concludes on a positive note arguing that no clear dichotomy exists between faculty and administrative power.

William F. McHugh, Associate Professor at American University Law School and formerly Special Counsel for Employment Relations, State University of New York, deals with the impact of faculty unionism on tenure by analyzing the causes of faculty unionism, discussing

the problems tenure systems create, and finally determines whether or not tenure matters will be negotiable.

At a recent workshop sponsored by the Community College Center, a group of community college presidents was asked to identify some of the major problems that they were facing in the administration of their institutions. The problem identified most frequently by the presidents was the changing relationship with their Boards of Trustees; and collective bargaining was mentioned as one of the possible factors having influence on that relationship. A study team consisting of Rose Channing, Dean, Health Technologies Department, Middlesex County College, Stuart Steiner, Dean of Genesee Community College, and Sandra Timmerman, a Kellogg Fellow in the Community College Center, all members of an advanced seminar in community college administration at Teachers College, decided to tackle the particular issue of collective bargaining and its impact on both board and president. The results of the study are reported as the third article in the monograph.

Finally, the monograph concludes with a summary of a dissertation completed by E. Gordon Gee, an honors graduate of the Columbia University School of Law and a holder of a doctorate in education from the Department of Higher and Adult Education of Teachers College, Columbia University. Dr. Gee analyzes the existing status of public employment relations statutes in order to formulate recommendations which will be useful to educators, legislators, and others involved in the legislative process to develop and improve these statutes as they affect higher education institutions.

We wish to thank each of the authors for his contribution. We would also like to express our appreciation to Barbara R. Brick for transforming speeches into written papers, as well as for all the other many contributions she has made to the Center and to the publication. Finally, we would like to express our gratitude both to Teachers College, Columbia University and the Kellogg Foundation for their generous support of the activities of the Community College Center.

Michael Brick

Teachers College, Columbia University
New York City

THE STRATEGY AND TACTICS OF COLLECTIVE BARGAINING

Joseph N. Hankin

There is no better way to understand the bargaining process than actually to go through it yourself. Suppose you receive a letter that reads in part: "The community college federation of teachers, local 1234 AFL-CIO, requests the board of trustees to recognize the statement of the academic faculty to bargain collectively with the board on matters of salaries, hours, and other working conditions. We further request that a secret ballot election be held," and so on. This might be a typical letter that would come to the desk of an administrator, usually the president of the institution, but not necessarily always so; or if you are a faculty member you might be involved in the framing of that letter. Each one of those words, hopefully, would have been chosen most carefully. The immediate reaction, unfortunately, is often panic, even when the administrator has been aware of the development of union sentiment on the campus. Reactions range from "Why me?" to "Those ingrates!" and many others. Unfortunately, there are frequently a denigration of labor's position, a nasty and even vicious newspaper and flyer campaign both in the community and on the campus, and a feeling by some that the end has come. Our basic position shall be that unionization is not the ogre it is generally thought to be, especially by the administrators. We should not lose sight of the fact that labor has performed a very valuable function other than their major one. For example, the AFL-CIO has come out with a series of informational pieces on drug abuse; unions have pressed for proper recognition of the minority group role in our history textbooks; they have called attention to the fact that 18-year-olds should register to vote; and they have engaged in a series of activities best described as muckraking with respect to labor and other conditions. By calling attention to these and other social issues they have performed a most valuable service. Often this is done for a variety of purposes not always unrelated to the major functions of the labor unions, but nonetheless the service provided is valuable. Now, of course, at this point some defensive administrator always says to himself, "Yes, and Hitler built the autobahn and the Volkswagen, too."

Collective Bargaining and Legislation

Collective bargaining in colleges and universities and even in some public agencies presents all of the difficulties encountered in typical commercial negotiation, and at least one important additional one -- the participation of faculty members and students in internal decision-making at colleges and universities which has no real counterpart in the

commercial field. Another handicap is the relative lack of legislation and legal precedents. Business establishments have over thirty years of federal and state labor board decisions to guide them with respect to such questions as appropriate bargaining units and other important matters. This is not to say that there is no legislation; some 32 states have some legislation for employees in the public sector. Nor is case law lacking, although it is frequently contradictory. But there is no common act applicable to all. You are all familiar with the development of several major pieces of labor legislation -- the Sherman Act, the Norris-LaGuardia Act, the National Labor Relations Act, the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act. These are not fully applicable to higher education, or at least they have not been in the past, although they may be in the future. There is a crazy patchwork quilt pattern of state laws. The Educational Commission of the States' magazine *Compact* recently featured the different laws and how each applied differently within the states themselves. The New York State Taylor Law has become a model; although I think that if you are interested in looking at labor laws which permit bargaining in higher education, you should look at those of Michigan, Pennsylvania, Hawaii, New Jersey, Massachusetts, Oregon, and Maine. There you will find some of the major pieces of legislation with which you might want to familiarize yourself. Some of these state laws are terribly specific. In Michigan (and of course there was a similar push in a recent session of the New York legislature) they actually wrote into the law the number of hours a faculty member must teach -- 15 hours for a community college, 12 hours for a four-year college, 10 for a graduate faculty member. They also list a percentage figure beyond which any increase in salary must be accompanied by an increase in productivity which the law defines as an increase in the number of credit hours being taught.

You might ask why should there be a law for a particular jurisdiction. The First and the Fourteenth Amendments of the United States Constitution give individuals the right to join, but do not obligate the employer to bargain with those individuals. The Iowa Supreme Court indicated about five years ago that, in fact, collective bargaining was permissible even without local statute. However, in August of 1969 in a decision of the Seventh Circuit Court of Appeals, in Lewallen, Alexander, *et al.*, vs. the Indianapolis Education Association, the court ruled that collective bargaining contracts can be overturned by taxpayers suits if the collective bargaining was not specifically authorized by statute. Since then, most states without such statutes have held that collective bargaining, while it is permissible, would be foolish to enter into if it is not backed up by appropriate statutory authority; and in fact it may not be legal to do so.

The lack of law, then, usually means there is a lack of definition

(for example, no definition of what is an unfair labor practice). There is no indication as to whether or not the agreement is to be written. Lack of law usually means that there is a lack of procedures, that is, there is no stipulated way of determination of representation. How is an election to be held, or how is a bargaining representative to be named -- is it through election or authorization cards, or membership lists? There is no indication of whether there is exclusive or proportional representation. If there is no law there is a lack of stated method for unit determination. (For example: are supervisory personnel to be included or excluded?) Incidentally, even if you have a law, that question is not necessarily answered. What I am suggesting is that without a law you have no clues or hints at all. Must all members of the bargaining unit belong to the bargaining representative's agency or pay dues to that agency? Again, without the law there is no indication. The range of negotiable items is missing without a specific law. There is no indication as to who the employer is: the board of trustees, or the county, or the state. There was a recent ruling in New York after the Ulster Community College strike which concluded that the counties were the legal employers of community college faculty members. However, an improper practice charge filed by a faculty group at Jefferson Community College in Watertown forced the Public Employees Relations Board to admit that the trustees were the academic employer, and the county was the employer with regard to financial matters. Thus, some controversy has been engendered here in New York State by PERB and, as far as I know, it has yet to determine who is the chief executive officer of the college. Some have felt it is possible that a ruling might be that each college has two executive officers, one for academic items and another for financial items; again with no law, you have no indication as to who the employer is. You may still have doubt even with a state law on the books, when the law itself does not indicate solutions to that particular problem: New York State has the very fine Taylor Law. Without a law nothing is said about who determines the bargaining unit, who conducts the representation election, impasse resolution, strikes, and penalties against individuals or organizations. In short, if you lack a law in a particular state, you do not really know who bargains with whom about what; and my advice would be, at least for those without state laws, not to enter into negotiations under those circumstances.

One issue on the horizon, that may force a homogenization of all this diversity, and develop a history of quasi-legal determination, is the entry of the National Labor Relations Board (NLRB) into collegiate employer-employee relationships -- into the substantive aspect of collective bargaining. As recently as the summer of 1970, Cornell University had a suit involving non-professional employees. The upshot of it was that the NLRB stepped in and said that private colleges,

with budgets of more than $1 million (and most institutions, as you know have budgets of at least that), were substantially involved in interstate commerce and, therefore, subject to NLRB jurisdiction. In the short space of one year the NLRB has gone even further.

On June 22, 1971, the AAUP asked the NLRB to issue general rules for private colleges: definitions of supervisors, appropriate organizations to serve as bargaining representatives, status of teaching fellows and research associates, and status of part-time teachers. Also, during the summer of 1971, the AAUP, supported by the AFT, and a bargaining committee from the Law School at Fordham University, petitioned the NLRB to authorize an NLRB-supervised collective bargaining election at Fordham University, thereby raising a large number of issues. For example, should the NLRB assert jurisdicition in that particular case? Are faculty members considered management (Fordham contends that tenured faculty members help to make decisions on other faculty members, help make management decisions, and therefore they should not be in the particular unit)? And should the Law School have a separate bargaining unit because the Law School considers itself apart from the rest of Fordham University? On May 26th the NLRB dismissed an election petition at the University of New Haven because the unit did not include part-time faculty members, the rationale being that part-time faculty members do the very same things as full-time faculty members. So again the NLRB has entered into the unit determination question by insisting in that case that the part-time faculty members be included in that particular unit. What happens next, is that an appeal from an NLRB decision may be made in the U.S. Court of Appeals; and then can be reviewed by the U.S. Supreme Court. The entire issue of NLRB intrusion is a most interesting development that bears watching.

Participatory Democracy and Shared Authority

I should like to turn briefly now to the difference between "participatory democracy" and "shared authority." Primarily the difference between "participatory democracy" and "shared authority" is this: in participatory democracy each of the major power blocs or units within the institution, students, faculty members, administrative staff, board, and non-professional groups, participate in the discussion and formation of solutions to problems. Ultimately, however, the final decision in this unitary form of governance is left to the board of trustees and its decision usually is final. Of course, it can be taken further than that, too, for it can be taken to the courts. This is a very simplified approach to the definition of participatory democracy. Shared authority differs in this way: there is no final decision made by one particular group at the institution, but rather by

the several groups. Let us say, in the case of bargaining, the faculty and the board have to agree mutually; each has veto power over the other with respect to either agreement or nonagreement on a particular set of issues. Then, when both agree, a particular contract can be consummated. There is, then, that not so subtle difference between the first case, of a unitary form with let's say the board of trustees having preeminence, and, the second instance -- shared authority, where the two groups have to agree. Collective bargaining is one form of shared authority in the sense that both the board and the faculty have to agree before an agreement is consummated. Now it is true that with respect to funding these agreements, there is a final determination that can be made by the local governing jurisdiction. Let us say that the county legislature does in fact say no. In that case, they must return to the bargaining table.

Why push towards shared authority? One reason may be the feeling of the faculty that students now being represented on college-wide bodies are actually diluting the effectiveness of the faculty senate or the faculty group that represents faculty interests. There is the very real understanding by the faculty that in the allocation of resources, up until this point, they have had relatively little say. Colleges must compete for students and yet they may find that wages and salaries and better agreements will, let us say, tend to increase cost and possibly increase tuition, and possibly siphon off financial resources from other projects. Of course, many colleges and universities have to become more efficient and discontinue certain kinds of operations. The faculties want a say in this allocation of resources because that is really where the educational decisions are made. The budget is nothing more than the educational program written out in dollars; the decisions as to where these dollars are placed is a very important one. Many faculty groups feel that since they are professionals they should be able to bargain directly with the board; that, of course, is a misconception because rarely is the bargaining ever done directly with the board. Actually, in many instances, faculty groups have tried to bypass the board and deal directly with the local fiscal authorities because they know that is where the final decisions are made.

Crane Brinton, in his *Anatomy of a Revolution*, discusses several revolutions: the French, the American, and the Russian, and he finds some common elements. He says that revolutions occur where a little bit of democracy has been allowed but not where repressive circumstances and an autocracy have permitted very little freedom to develop. Where some freedom has developed, it has whetted the appetite for groups to press for further gains; and often they will resort to revolution in order to obtain them. You might think about that in terms of American higher education where some faculty groups, realizing that

they have certain privileges but not others, have decided to press for still further representation equal to other groups within the institution. Then there is Ronald Corwin's thesis that it is not salary items that are causing this push for shared authority and equality, but rather the decision-making power which is the key driving force, the search for control over one's destiny. There is, he finds, a feeling of incongruence among statuses at the higher education level, a feeling, on the part of the faculty, of a rather poor social status in comparison with what it really should have. Some of you may have read Richard Hofstadter's *Age of Reform* and find that this thesis definitely compares with the feeling of the progressives in the late 19th century and early part of this century. Finally, there is an adversary relationship that often develops. Some feel this is a *sine qua non*. The upshot is much as Corwin has said: a power struggle, in the sense that at a collective bargaining table each group is vying for power -- the ability to allocate resources. When we get into the specific issues, we shall find that we are not really talking just about salaries and hours and working conditions, but, in fact, the very real governance and control issues. Faculty members and administrators today often feel they must forget the past, that collegial relationships, as you would find under participatory democracy, do not necessarily exist; but that a power relationship does exist, and that the result is a very time consuming and emotionally draining, often bitter, and physically exhausting process.

Unionization and Changes in Relationships

How will the relationship of the faculty, administration, and board change under collective bargaining? Relationships may very well become more formalized and rigid than they have been before. Administrators may very well find it difficult to discuss all educational matters as freely as they have for fear of committing a grievance. Much of what formerly was very informal now has to go through the formal machinery, which is slow. Formerly it was a relatively inexpensive process to bargain through your own local faculty association; now dues will start off at $2 or $3 a month and gradually increase. It is not uncommon for dues to triple from $3 to $9 a month within a year or two. Many faculty members do not spend that amount on all the professional associations they belong to during the year. In a recent UFT publication for the teachers of the City of New York an increase in dues was asked: "Members now pay $7.25 a month [and they break down what this pays for]...This leaves only $3.70 per member, not much when one considers that a single grievance which goes through arbitration costs UFT over $1,000 and that each UFT election costs over $40,000..." It proposes that by 1975 the dues for an individual will be one percent of the median salary.

Faculty senates have often been criticized for having neither teeth nor war chest. The question really is, can an institution arbitrarily separate responsibility for working conditions from educational policies. That is the major issue you have to face. Frequently if the faculty senate or association is not the bargaining representative, but a separate bargaining unit is, the representative will claim either through gentlemen's or written agreements that there will be a separation between the professional role and the employee role; and, that the faculty member will exercise the responsibilities for educational policies through the senate, and matters of salaries, hours, and working conditions through the bargaining representative. Faculty members in higher education exercise what are usually management prerogatives in industry: the granting of tenure and promotion, and decision-making on a raft of issues. This causes a real problem; there are borderline cases, a whole class of issues, that you cannot really say are salaries, hours, and working conditions on the one hand, or educational policy matters on the other hand. It is difficult to tell where one begins and the other leaves off. For example, class size -- including special minority group admissions and programs which ma affect class size -- is that an educational policy or is it a working condition; faculty-student ratio or counselor-student ratio; total teaching load including office hours and committee assignments; extracurricular responsibilities; and time off for negotiations? Criteria for placement on the salary schedule or promotion including determination of teaching effectiveness -- is that a salary item or an educational policy item? What about overload teaching which may interfere with academic performance, travel to profesisonal meetings, college calendar, assignment and schedule of teaching responsibilities made by whom and based on what? Salary increments -- are they for merit or automatic?

In short, if a campus does arbitrarily divide itself into let us say, professional or educational matters, and into employee or salary, hour, and working condition questions, it may very well be sowing the seeds for future dessension within itself, for groups could very well hold conflicting opinions on some issues. Moreover, if it is in writing in the contract, I think we may run the risk of trying to bind a third party, the general faculty or senate and its constituent bodies. If the institution, through its board and the bargaining representative, say an AFT or NEA or AAUP chapter, mentions that the educational policy matters will be left in the hands of the college senate, I would question whether it is legally able to consummate that agreement and bind a third party to it in that way. Decision-making is now widely diffused, and some issues take an awfully long time, as you well know. The major question is, will the faculty accept that issues be decided by a few and perhaps in haste; and whether or not the faculty senate will in fact be giving up its duties and responsibilities through such an agreement?

Election Procedures

The NLRB has been more and more inclined to accept authorization cards as sole evidence of a majority. In the Bernel Foam Case, an industrial case of a few years ago, the union said it had a majority of cards and petitioned for an election. The election was authorized and held; the union lost. Yet the NLRB overturned the results saying that, at one time, the union had a majority of authorization cards and therefore, on that basis, the union was to be the bargaining representative. In one institution in Maryland, a group came in with authorization cards, never showed them to the president, and said they had a majority of the faculty. I suggest to the administrators, at that point, not to even look at the cards or allow them to go to a neutral third party. Tell the union you want to consult with your labor advisor before taking a position; ask them to put everything in writing; be polite, business-like, and firm because you can hurt yourself by even offering to examine the cards.

Now, to introduce something quite fascinating -- that is the question of unit determination. A group will say it has a majority; a majority of what? The authorization cards may represent a majority, a majority of what the union feels is the "whole"; and I think that is important. The usual legal phrase used is a "community of interest," similarity of duties or common skills or job classification and title, employee benefits, work load. In the State University of New York, PERB included associate and assistant deans in its unit; this is interesting because other places do not. There exist numerous *ad hoc* decisions. There is no clear trend as to what a unit is or is not. In New Jersey in the PERC decision, six separate units were created for the state colleges, instead of only one, which ANJCUP, the bargaining representative wanted. The rationale in New Jersey was that the colleges were geographically too separate to have one large unit. Yet, in the City University of New York two units were created, each citywide: one basically for full-time, and one basically for part-time and non-tenured people.

I should like to suggest, for purposes of argument, that the dividing line might well be the responsibility to employ, evaluate, and separate the faculty member, a fairly standard measure in industry. Perhaps division chairmen and department heads who have responsibilities as administrators (after all, they are in a swivel seat for they serve both as faculty member and administrator) ought not to be included in a particular unit. Moreover, if the division chairman is in the unit itself, who will enforce the contract at the divisional level? Some colleges have been employing assistant or associate deans in order to bypass the chairmen. Should part-time faculty be included in the unit? At the University of New Haven the NLRB struck down the

petition for an election because part-time faculty members were not included in the unit. This is an interesting definition because if the NLRB gets more and more into the collective bargaining situation, not just in private but also in public institutions, are we also going to have that kind of ruling with respect to public institutions? Administrators themselves surely would like to bargain, although in some places the index concept in salary helps them without making them bargain for themselves. How about quasi-administrators like directors of athletics who really are faculty people released for quasi-administrative duties and responsibilities? How about counselors and librarians, and technical assistants who teach and student employees and secretaries and maintenance personnel?

Range of Negotiable Items

What is negotiable? Collective bargaining no longer occurs for only two or three months prior to the consummation of a new contract -- it is now a year-round process. Thus, in the next round of bargaining you know very well that your grievance record is going to come up. You are aware and try to anticipate those issues that might be presented. What did the union take off the table last time around? That probably also will be negotiated. What issues arose during the year? What in the agreement is causing trouble? Where is the current agreement unclear? I'd like to suggest that in creating a list for yourselves, regardless of whether you are faculty members in a unit or administrators outside of a unit, you try to guess at what would be included. I would advise administrators to keep abreast of union views, speeches, publications, memos, and conversations. Subscribe to union newspapers and commercial reporting services. Review nearby agreements and hold conferences with the affected administrators. What concessions were made in the next county or the next jurisdiction and why were they made? It is very effective to say, when the bargaining representative says we want item X because the college in the next county has it, "Yes it's true they have it, but their conditions were different and ours require different solutions." For example, one community college might have a 12 hour teaching load in a state and that might be "whipsawed" against another institution. You might say, "That's true but you also know in that county it's also true that faculty members have, as part of their regular load, responsibilities for directing extracurricular activity." Of course you say that naively, as if the bargaining agents did not know that. Part of the reasons why we have so many negotiable items is, of course, that working conditions are not very clearly defined.

We don't borrow enough from other disciplines, as I indicated before -- from diplomacy or from military affairs or gamesmanship or any of the social sciences. Strategy for purposes of definition here will refer to a very broad plan of action, effectively using resources to obtain an objective. Tactics on the other hand, refers to the plays and the moves to be made, as one military manual puts it, "while actually engaged in combat with the adversary."

The first question I would like to discuss is that of team selection. The first contract probably is the most important contract that will be negotiated in an institution, so the team selection will be especially important. As a matter of fact, everything will be especially important the first time around. The smaller the team the better for purposes of secrecy and flexibility, and some feel that it doesn't hurt to give the image that the administrative team is outnumbered, that an underdog image can help to gain employee and even public sympathy. Probably not more than three to five should serve on the team, plus a back up team that is probably never present or rarely present and subcommittees on specifically knotty issues.

Should a board member be included? Should a commissioner or legislator be included? How about the president? How about the deans? I would like to suggest no for these four classes of individuals for several reasons. Take the dean of the institution or the president. Those people have to deal on the firing line not only with the other team later on, but also with the whole of the faculty. It is very easy for the faculty to associate the dean and the president with "the enemy"; it is a natural thing anyhow and may be augmented and reinforced. The team should include a top level administrator, not necessarily the dean of the college or the president of the institution. It might be the business manager, or the personnel or labor relations person, if the institution is large enough to have one. Perhaps the director of institutional research could also serve. From time to time this team could be joined by legal counsel or specialized personnel; but usually that should be done not on the floor of the meeting itself, but rather behind the scenes. Finally, I would suggest a professional negotiator for both sides.

What are the characteristics of the individuals to be selected for the team? Can the person remain objective under stress? Can he or she keep some aspect of dialogue going and avoid saying "no" too directly, thus creating an impasse? The time involved must be considered. This is a tremendously time consuming operation -- not only the sessions themselves, but also the preparation involved. Can the person control his temper? He should be persuasive, patient, skilled in clear direct prose, logical and analytical. He must be familiar with negotiations

procedures, and with the entire organization and community. A sense of humor doesn't hurt. He has got to be detached; he doesn't personalize the issues; he has a good sense of timing. A close relationship with the decision makers of the college must exist. He should be able to listen and read cues; outgoing; not closeminded or stubborn; tactful but firm. He has to make both sides think they are the winner; he must be respected; he has got to have physical stamina; he must have the authority from the board and the president to bargain. If it sounds impossible to get all these qualities in any one individual, that is true; but those are the things you look for. In brief, as Fred Charles Ikle has indicated in *How Nations Negotiate*,

> The Compleat Negotiator, according to 17th and 18th century manuals on diplomacy, should have a quick mind but unlimited patience, know how to dissemble without being a liar, inspire trust without trusting others, be modest, but assertive, charm others without succumbing to their charm, and possess plenty of money and a beautiful wife while remaining indifferent to all temptation of riches and women.

There should be several preliminary meetings by the entire team beforehand for determining both strategy and tactics. There should be one spokesman on the team. No team should be forced into backing an unplanned statement by someone other than the spokesman.

Internal communications are quite important not only to the board and the president and others on the team, but also, and I have to say that this is very important, from the management point of view. Do not forget to keep your own faculty members and other employees informed during negotiations. Do not leave this entirely to the bargaining representative. Of course, you have to be careful not to commit any unfair labor practices in doing so, but do not let it be all one-sided or in response to what has already been made public.

What about the information that is needed at the bargaining table? It is probably wise for both sides to keep a bargaining book including files on laws and constitutions, existing regulations, interpretations of those regulations, other nearby contracts, grievances, fact-finding reports, interpretations on reports, salary information, information about the financial status of the institution compared with other similar institutions. Have revenues been increasing? How? What about expenditures? What is the per student cost data? What is the percent spent on instruction, administration, salaries, and benefits? What is the cost of the salary and other proposals? What are the cost of living changes, the cost to the institution per faculty member, and the percentage of fringe benefits, the cost and savings of the board's tentative proposal, the faculty-student ratio, average class size, enrollments, load, especially where you can get information to compare with

other institutions, faculty retention and turn over rate, economic data on important issues, assessable base, and so forth?

There is a host of things you have to consider procedurally before the bargaining actually begins. Should it be at the college? Oftentimes the faculty bargaining representative wants it away from the college because he feels it is a specific disadvantage in having it on the home grounds of the institution. How about the seating around the table? The Paris Peace Talks are a tame game in comparison with some of the hassles which have gone on about the seating of some collective bargaining representatives. Should there be privacy? I think that public negotiations tend to be performances and that there should be privacy. What about the agenda, the timetable? There probably should be a firm timetable to avoid stalling and frustrations by either side. Record-keeping -- you have to decide who is going to keep what kinds of records. Probably it is wise to keep notes, and not minutes or tape recordings. About publicity -- to this writer, it is foolish to announce the demands and the progress, because the end result may be compared with the starting position; but oftentimes, this is done.

You also have to agree at the beginning about post-negotiation agreement implementation. Who is going to duplicate how many copies? Finally, with respect to strategy, you should attempt to estimate the goal -- what you are tyring to reach in the final agreement. The team should be working toward something specific, not groping toward the unknown. Always know that there are three levels of bargaining: what would you like or what would they like what you could live with, the retreat position; and what is unacceptable, a no retreat issue. Set realistic goals. Place yourself in the other negotiator's shoes to understand his problems. There's an old school debater's motto that he who knows only his own side, knows little; I suggest that it is important for individuals on both teams to know and guess what the others are going to say. Know at the beginning the total package and price the institution can offer by the end. Items cannot be negotiated in isolation from the total financial picture. Too frequently they are. Bargaining from the budget, I would suggest, favors the administration, especially in these days of tight dollars.

Tactics of Collective Bargaining

So much for the broad strategy. Now to the tactics themselves. You will receive a long list of demands. The union representative, you realize, must take something back to his members otherwise there will be other bargaining representatives vying for the affection of the faculty members. He has to make it appear as if what he gets is more than they really expected. Frequently they will request double their expectations. You are going to find other items which are submitted merely

to gain experience in bargaining for the future. ("You know we don't really expect to get it this year, but if we present it for two or three years, by the third year maybe we'll get it.") Then there are going to be "red herrings" or "throw away" items, to be conceded in compromises. ("You know we don't really want that but, if we ask for a lot of things, we can appear to give major concessions later on.") The best tactic at the point when this long list of demands is presented, is to insist on specific justification for each and every proposal, so that your negotiators can tell immediately the items that have been copied from other agreements from the items that grow out of genuine institutional needs. So you have to analyze these demands then in terms of: is it a local issue or a wider issue, what are their causes, the causes of changes, where are the strong and weak arguments, are the college's counter arguments and counter proposals strong, what effect would concession have on the entire institution's operation, and what would be the cost of these items. Then insist that no new demands will be presented later on. Do not negotiate a blind contract. Be sure all of the demands have been presented. Do not be fooled by "Well, we have only a few major demands and we will reserve the unimportant minor points until we clear up the big issues." Get them all out on the table at the very beginning, insofar as possible.

Good faith bargaining is another term we have introduced here. Parties are not compelled to agree or to concede, only to make good faith efforts to reach an agreement. In other words they have a duty to bargain. The NLRB has held that good faith is lacking on the part of the employer if one of these conditions holds: the employer refuses to send bargaining conference representatives who have the power to negotiate, or he constantly shifts position in regard to contract terms, or if the employer is determined not to enter into a collective bargaining agreement, or is deliberately delaying or hampering the progress of negotiation, or if he has unilaterally granted concessions to employees while negotiations with the unions were pending, or has engaged in a campaign to undermine the union, or has insisted upon contracting with the employees rather than with the union, or has rejected union demands without offering some counter proposal, or he refuses to embody in a written contract the terms that had been agreed upon. Good faith bargaining is not yet a legal requirement in most states and the NLRB does not yet exercise jurisdiction over many colleges. Most of the legislation enacted prior to 1966 failed to provide any person or agency with the authority to investigate allegations of bad faith and to take remedial action if the allegations were justified. In Wisconsin where the Wisconsin Employee's Relations board is authorized to investigate charges of bad faith, the only legal power appears to be the issuance of a public report.

The first meeting after the procedures are set is usually reserved just to receive the proposals and clarification, not to react at all or make counter proposals. It is also reserved to set the climate. Negotiation makes for better understanding if done constructively, so it is highly important that a constructive climate be set at that first meeting. The college gets a much better understanding of what makes the union and the employees tick, and vice versa. Constructive negotiations forge an alliance that is good for the institution and all its constituents.

Between the first and second meeting you should examine the demands. You might have anticipated most of them, and you might not. You have to price all the union's proposals. You should try to establish that the terms of the contract become effective on the date the agreement is signed, or later, not retroactive to a prior date. Avoid negotiating against the clock. Start early enough and make sessions long enough. A rough rule of thumb is a minimum of four hours. Allow enough time between sessions to prepare carefully for the next session. Probably there should be a week between the first two or three sessions. Later you can hold two or three a week. Have the objectives very carefully discussed with the entire team prior to each session so the team can be firm in following the direction that you want to take rather than letting the course of events sweep you along. Explain that all matters of agreement are tentative until the final moment when each issue is either resolved or removed from the table, and the contract completed. Any tentative agreement may have to be modified during the later course of bargaining.

Management's first economic proposal should include about half of its anticipated increase -- a rough rule of thumb. There is no certainty in any of this -- it will be viewed as a floor level offer no matter what it is; unions become increasingly hostile if no additional gains are made during the course of bargaining. There is a theory of bargaining called Boulwarism in which you give everything you plan to give at the very beginning; and then you hold fast to that position to show you are being honest rather than holding back. I think you will find from experience that this method is probably not very effective today. Often by putting one's best foot forward early enough in the negotiations, the employer strengthens the position of the moderates on the other team, and slows down the drive of the militants, whereas if he saves his concessions until the deadline the employer might give the militants added strength.

Now, to management demands -- there are two basic philosophies. One is that you react to the union's demands; that is called responding or reaction bargaining. The other is that you present your own proposals; that is aggressive or action bargaining. My own position

is that in the concept of shared authority with the balance of power at the table, you have a responsibility to present your own set of demands. Remember in all of this that it may be easier for a sacred cow, maybe we'll call it, to pass through the eye of a needle than it is to persuade a group of faculty members to give up a benefit they currently enjoy. Some management demands might be formal job specifications for faculty members, vigorous evaluation systems, increased student contact productivity, and lengthened academic year service -- especially in return for economic gains, assuming that the group is primarily interested in economics. ("After all, if we can quantify some units of work load, why can't we quantify other units of work load.") Others may include: merit pay systems in lieu of automatic increments, the right to initiate experimentation with class size, systems approach, team teaching. Attempt to obtain stability by demanding longer union contracts (except for the first contract which you do not want to be long-term). Propose five year renewable contracts in place of tenure; no faculty participation in a whole list of things; grievance procedure with nonbinding arbitration; committees not include solely the bargaining representative's choice; no overload, because this can be rather expensive. Don't let the contract bind third parties (for example, secretarial pay). State the changes required to make instruction more effective.

Be certain that the college's demands are fully developed. After all, we can't very well insist that the faculty demands be fully developed, and not do the same with the institution's. Are the objectives of the institution consistent with its demands? Are these demands consistent with good employee relations? Are the demands outmoded? Are they worth the price? You have to check the effect they may have on the entire college. Above all, and this might seem contradictory, you have to know when to stop. You have to know what is too excessive to request. Sometimes you will insert a clause that is more editorial than substantive. A "no strike" clause might be included even though it may be illegal to strike in a particular state. This does help to turn public opinion against the strike, should the employee organization do so. The union will try the same things. They are going to, even though unfair practices are prohibited by law, include an unfair practices clause because they feel it gives faculty a contractual as well as a statutory base.

More on Tactics: The Minute, Mundane, and Nitty-Gritty

Francis Bacon wrote in his essay "Of Negotiating",

> If you would work any man, you must either know his nature and fashions, and so lead him; or his ends, and so persuade him; or his weaknesses and disadvantages, and so awe him;

> or those who have interest in him and so govern him. In dealing with cunning persons we must ever consider their ends, to interpret their speeches; and it is good to say little to them and that which they least look for. In all negotiations of difficulty, a man may not look to sow and reap at once, but must prepare business, and so ripen it by degrees.

Many of the same suggestions also pertain to the faculty's bargaining representative. Both sides should remember that they are bargaining with individuals who are as good as or better than they, and that many of the tactics will not work, or will be employed against them. Matching wits makes the entire process interesting and exciting. What is the order of handling issues? There is no set pattern. This will be a matter of individual circumstances and individual negotiator's preference. Some begin with salary and economic issues, others end with them.

Never relinquish control of the meeting if you can help it. At the beginning find some inconsequential point and be slightly contentious about it in order to gain control and to test the strength of the other team's negotiating agents. In tests of strength premature showdowns may begin on a subordinate issue and may get out of hand. Unfortunately, parties are then forced to decide questions of war or peace through secondary rather than major issues. Be on guard. For example, rather than salary, the question might be the employer's insistence that the union not walk out or slow down during negotiations without five days notice. You do not want to get off to a contentious start on that one.

Faculty bargaining representatives will frequently argue "quality and equity." They will hammer at that constantly -- for ratios, for class size and other matters. For example, "Spreading yourself too thin is not quality, long lines for counselors is not quality education, overload work in any other field pays time and a half. We're only asking for equity." When the union persists in raising inequities, either insist on concrete proof and facts, or sit though them and let them blow off steam because often they will do just that. Or they may say, "It's an operational necessity to fix a broken boiler at this institution. Well, we think it is necessary for the institution to fix and right these instructional wrongs. It's more important, and more central to the educational process." It is very difficult to argue against these things, for you yourself have always stressed quality in education and now you are talking quantity -- of dollars. Besides, they may be right.

You must show interest in all of the evidence presented. Never

interrupt a proposal when it is being formulated. Consider carefully all utterances, and also what is unsaid for that is perhaps more important than what is said. There may be good clues to the final settlement position. Here is a sample of some give and take. The administration team may say "You can hardly expect us to take your salary request seriously when it is combined with these major changes and fringe items which add up to an equivalent amount." What they really mean is, "We aren't going to move on the salary item until we can get an indication of which of these fringe items are really serious requests and which are thrown in as window dressing."

The union may turn around and say, "We're expecting the company to take all of these items seriously. Our people feel that this program is no more than they are entitled to considering the college's financial status and the trends in other institutions. Our program for a four day week is becoming prevalent throughout the country. And about overload pay -- you're going to have to get in line on that. Look at what college A and B in the next two counties have done on overload. They've already granted exactly what we are demanding from you now." The union is really saying, "Look, Mac, we're not kidding on the four day week and the overload pay; but we may be persuaded to drop the group insurance item if we can get together on the wages and these other two."

Then management may retort, "All right, let's look at the facts. Your statement about what college A and college B have done on overload pay is correct. However, you'll also note that while they have done this, they certainly didn't grant a wage increase even approaching the figure you have presented to us. Furthermore, we feel that the pattern on overload pay is still below what we are asking." They really mean: "We'll probably move on overload pay if you'll come down to earth on your wage demands, but we are steering clear of the four day week (because the union didn't mention it); we're not prepared to move on that particular item." And so on.

You must read between the lines. This is difficult to do and only comes with a great deal of practice. Learn to read verbal and visual reactions so as to determine who is in control and who is weak. Learn to expect table pounding and strong language; they are often used, especially if the first round of negotiations is against inexperienced employers. Sign language is a very protective device. You want to offer concessions, but you do want to protect your strength even as you indicate a concession, so signs can be verbal or visual or even plain silence. For example, an employer has been saying "no, no, no" each time the union raised an issue, and then suddenly is silent on a particular item and does not issue a single word of rebuttal; that silence could very well mean a willingness to concede the point, pro-

vided other issues are settled to his satisfaction.

At all times, attempt to enhance the prestige of the opposing bargainers, for it will help later in ratification. Some of your retorts (they should be non-commital and evasive if possible) might be, "Now that you have raised the issue, the contract should contain language to cover that type of circumstance"; and try to move away from it, until later. Or, "I don't want to offend, but..." Or, "I'd like to move away from this subject now. I know how you feel, but I have to feed it back into the total picture," meaning that you want to think about it a bit further before you react. Or, "We appreciate the dedication of the faculty." (That's always a winner.) Or, "Give me a chance, and I'll try to put something into language." After a particularly violent emotional reaction by an opponent, just make a simple statement like, "Well, I understand how you feel."

Always show the consequences and implications of economic demands; then give them the responsibility for choosing among alternatives. If you currently have a fifteen contact hour load and a twelve contact hour load is presented, you have to say something like this: "Well, this means if you're going from 15 to 12, that it's a 25% not a 20% increase in the number of faculty members required, and office space required. This means it has capital implications for building more faculty offices, which will mean spending both capital and operating dollars on this, rather than that, issue." You should develop it thoroughly, and then let them have the choice of whether to press forward with that demand or not.

It is probably wise to use a work sheet for yourself in which you present the data, the current practice, the proposals of the parties, and the final agreement as ultimately settled. It is going to be very useful in future negotiations and may be absolutely crucial in grievance proceedings.

Never make a spontaneous commitment without deliberation and caucus or prediscussion and knowledge (in which case spontaneity may be planned.) You can take three meetings to respond specifically to a proposal. At the first meeting that the proposal is made, you may say you want to think about it. At the second meeting you ask for clarification to make sure it is really what you heard and that they haven't changed their position. Then, at the third meeting, you can react.

A caucus occurs when the group says, "We want to call a halt for a few minutes and go out to discuss this specific item." Rarely caucus without coming to an announced decision. Avoid overuse of the caucus or dragging it out. Deliberations should be done before the session or between sessions. You can always table an item and come

back to it later. The team that calls the caucus is responsible for reconvening the meeting.

Adversaries should be pressed into initial agreements, insofar as possible, under the urgency of the moment, and preferably before they have second thoughts. When you try to drive your opponent into retreat, do understand his problem, and provide him with an avenue of withdrawal. Don't do this for his sake but rather for your own; otherwise he will continue to fight, having no other choice, and force you to pay a high price for your lack of understanding. If you win a point, credit him for his sincerity and fair mindedness rather than gloating over the victory; otherwise you may be sowing seeds of dissension into subsequent negotiations.

At the beginning sessions agree on the issues that you can, and elude the rest. That is known as the bypass technique, a good psychological tactic. Avoid saying "no" directly. Remember, he who says "no" is no diplomat. Too often a fixed dollar becomes a position from which neither party will retreat gracefully; then neither is in control of events; and these events can sweep them headlong into a strike. So saving face often becomes most important, thus saving the institution.

Sometimes it's better to narrow down each issue to an area of predictable settlement and move on allowing ultimately for a greater variety of ways of settlement. Always note down the date and time agreements are arrived at. Keep your own record because you may have to come back ot it and say, "You agreed on this on such a date and time."

The *quid pro quo* trade-off is effectively used throughout the process. You don't have to offer a counter proposal to everything the faculty purposes. A trade-off could be to invest the savings from one item to a benefit that is more desirable, or would gain wider acceptance. Beware of horse trading; always look a gift horse in the mouth. Either it could be whipsawed, or you may be giving away a valuable concession for it. We frequently tend to think that things occur in a vacuum, that union representatives don't know what's happening in other places. Often there is a pre-planned program of demands. The union will decide, "At this college we will ask for item A; at that college we will ask for item B, and at this other college, item C." Then they will give in on some items in order to get A here, B there, and C over there. Next time around, these are going to be whipsawed or leap-frogged; college B is going to say, "Look, they have item A over there, and they have item B next door; we'd like to have those, too." So you always have to be careful that you are not giving in on a major concession, because you may be giving away more than you think.

During the bargaining, as salary and other demands move downward, remind the union that it is giving up pipedreams; and as management salary concessions move upward, remind the negotiators that dollars and cents are being spent. Fringe benefits are not appreciated as much as salaries; so they don't help as much in recruiting and are rarely the real strike issues.

Be clear about definitions. "Seniority" is a word that is frequently used. What does seniority mean? It could mean original date of employment. It could mean rank. The full professor has seniority over the associate professor. The full professor might have been employed five years ago and the associate ten years ago; so you must be very careful in definition of terms. How about "day"? Do you mean working day or calendar day? It is very important in grievance procedures, when you are given five days in which to answer, and a weekend intervenes. A "day's" salary should be carefully specified. The contract clause should not read, "Employees shall be paid a day's wage for each of the following seven holidays on which they shall not be required to work." Rather the contract should read, "Employees shall be off on the following seven holidays without loss of pay" or else even if the holidays occur on a weekend, employees may expect an extra day's pay.

Be vague only when you consciously intend to be vague. Beware of clauses that provide for mutual decisions or determinations, since they may be management rights at present. Keep verbiage to a minimum insofar as possible. You can word things slightly differently to help save face and yet retain the original meaning. You should use as much of the demand terminology as possible; it helps to gain acceptance if the groups hear their own words; so keep track of key phrases. Also, wording itself is a key that can negate a very strong provision. Instead of "The maximum number of students in an English Composition class shall be 20," (if you want to weaken that and agree to give in on that concept) you might want to say, "Wherever possible, no English Composition class will contain more than 20 students." This kind of wording often destroys the utility of a concession, but also may sow the seeds for a grievance; so be careful not to overuse the technique. You should reserve several items, that you know you are going to give in on, to trade off on some sticky items that you want to be free of -- for example, reduced load for chairman, academic regalia for commencements, the four day week.

Sometimes a minor concession, if stated properly, can save face and break a log jam. Convey the impression that it is a major concession, of course, it's a change in team philosophy, it's an increase in the maximum offer. You can say something like this, "We probably won't be able to sell this to the board very easily, but after com-

pletely reviewing once again your original demands and our counter position, we think a large concession on our part can break this log jam. We wouldn't do this if we didn't think that a breakdown here would be inimical to college-staff relations. It's not what we want, but we cannot win on every item, and we're aware of that. But, we have to ask you to give up such and such for this."

You have to take into account turnover costs and poor morale. I'd like to just briefly say something about this even though it applies more to industry than to education. The turnover cost in a company in one particular industry comes to $556.92 per employee. It's very expensive to lose people. If we prorate this turnover on an hourly basis, and assume the company's employees work a full 2000 hour year, it immediately becomes evident that the turnover cost is equivalent to a wage increase of at least 25¢ per hour; and you know that it is rare that a company would grant a wage increase of that large a sum.

To avoid an impasse over a particularly knotty issue, consider forming a sub-committee. When something seems to be headed toward an impasse, a good phrase is, "the best we can do under the circumstances." Or, you can show a definite intention to make a concession to facilitate progress by saying, "I don't think we'll have much trouble on this point if we can get the other one settled right." Private conversations between two key participants, away from the table (to bypass possible crises) often will work. Mutual trust must prevail at that time. Sometimes your own team isn't even let in on the private talk.

Many agreements are reached in the wee hours of the morning. Never give up. Everyone wins. At least everyone has to think he does. But, let the faculty bargaining representatives take the credit because they have more to sell. The agreement should be mutually unsatisfactory also -- no lopsidedness -- each side should not only win but each should also lose fairly equally.

Withdrawal of Services: Strikes and Other Techniques

Let us now pay some attention to the question of withdrawal of services -- strikes and other techniques. A problem arises when the right to bargain collectively in the public sector comes into conflict with other rights, most particularly with the right of the public to have its health and safety protected. These are the rights that gave rise to the injunction proceedings of the Taft Hartley Act, by which the possibility of a strike can be forestalled for 80 days; although that doesn't pertain, at least not yet, to the public sector and to education.

The first strike in the United States, in the private sector, was called by the Philadelphia printers in 1786. The term comes from the phrase "strike the sails" to keep a boat from moving. Even though the strike is illegal, for the most part in the public sector, the strike is old. We have had numerous work stoppages. You all remember the one in 1919, the Boston Police strike, during which President Coolidge said, "There is no right to strike at any time against the public interest." By 1940, David Ziskind, who wrote a book on the subject, found that 1,116 strikes in the public sector had been called. John L. Lewis dramatically demonstrated that you can stop work and defy the government, even during a war, by his classic statement that "You can't mine coal with bayonets." Today, 38 of 50 states ban strikes by law, court decisions, or attorney generals' opinions. However, there are often no penalties for strikes; nor when there are penalties, are they enforceable. Take the 1970 police strike in New York -- they are still arguing now as to whether or not the individual policemen will pay the sanctions that were imposed against them; and I understand that some 21,000 warrants are being sworn out in order to force the policemen to pay. Since 1947, we've had the Taft-Hartley Act and the Executive Orders dealing with strikes. It is interesting that in 1970 the United Federation of Teachers fired three of its field workers, in part for picketing in violation of the contractual no-strike pledge in its own contract.

From 1958 to 1968 there was a great increase in strikes -- 74 per year compared with 42 per year for the period 1942 to 1958. In the period 1966 to 1968, teachers accounted for 44% of all strikes in the public sector. To give you an idea of the recent change, there were no strikes in 1958. In 1968, ten years later, there were 112. As indicated earlier, the NEA attitude has changed to where there were no NEA strikes from 1952 to 1963 and again in 1965; but in 1966, 80% of all the teacher strikes were by the NEA affiliates. In fact, 1966 seems to have been a turning point, for in 1965 there were 9 strikes, and in 1966, 54. The New York strike in 1968 lasted 55 days, involved 47,000 teachers, and 1,645,000 man-days were lost.

Regardless of legality public employees, teachers, community people, and students have discovered that overt action pays off. Some submit that blacks still might not be eating at lunch counters with whites in the South if they had not resorted to what were, at the time, illegal sit-ins. It is well known that teachers of kindergarten through high school have improved their salaries and working conditions tremendously by resorting to illegal strikes in one state after another; and university students through strikes or violence, or threats of violence, have effected changes in the decision-making process of universities.

The goal of all, of course, is to avoid the strike. It moves the pressure from the negotiator to the board. However, the strike is dangerous to use as a lever because management always bears it in mind; and once called the power of initiative is severely curtailed. Faculty members, of course, pay for strikes, as do all employees, in lost wages. There is a tremendous pressure for public statements during times of strike. A good rule of thumb is: never pay more to settle a strike than to prevent it; or there will be a strike every year if you buckle. In other words, don't reward people for striking. Now you cannot avoid strikes unilaterally, so don't be apprehensive about them. Don't be afraid of a strike and be stampeded into settlement. Only a small percentage of the strike threats ever really materialize. A majority of the unions don't want strikes because they do absorb union personnel and money; they always contain the threat of losing; faculty members don't want to lose money and get poor publicity; and strikes rarely occur unless there are genuine strike issues, that is, real impasses of major significance. Remember that even though a majority of faculty members may not be for a strike, they still may walk out because, once a strike is called, the life of the union is in jeopardy; and that often becomes more important than the issue which causes the strike itself. Faculty members who are opposed to a strike will walk out in order to avoid a split which could destroy their bargaining representative.

Then, of course, there is the withdrawal of services just short of strikes. There is the slow down, or partial effort; there is the work to rule, that is, the regulations of the rule book will be followed to the letter, and that constitutes a slow down; there is the safety check; the red rash where the firemen became sick; the blue flue when the policemen became sick; the professional days that teachers take all at once on the same day; and the tactic of leaving the drawbridge open. Some refuse to issue traffic tickets, or refuse to work overtime when it is needed; groups may picket in lieu of a strike; and there may be mass resig tions in lieu of a strike.

There are four major alternatives to strikes -- or, the methods of impasse resolution. The first, and sometimes you will find this in the local or state statute, referral to higher authority, let's say the commissioner of labor. Then there is mediation, which is the most frequently used, whereby a third party tries to reconcile the differences. There is factfinding, where the determination attempts to compel the parties to accept the findings as the basis for voluntarily reaching an agreement. And finally, there is arbitration, the weighing of facts and the making of decisions by a mutually agreed to outsider whose advice could be either advisory or binding. However, the courts have now held that even in binding arbitration, an award can be overturned legally.

Some Key Contract Clauses

We have discussed the management rights clauses or management demands before. Basically, the clause reserves to management all rights not specifically delegated by the agreement. There is a lot of contention over whether or not an institution of higher education should ask for such a clause. Many colleges believe that it is not to an employer's advantage or interest to include a statement of management rights, for when management rights are included in the contract, any matter not mentioned may be interpreted not to be a right, or may cease to be a right. It is presumed that the employer can exercise full privileges on issues where the power of decision normally rests with the employer. Since management already has the authority generally specified, such a clause is usually unnecessary. Should the union and management not agree to the inclusion of a management rights clause in the collective bargaining agreement, the false presumption could be made by the faculty bargaining representative that since it did not grant a management rights request, the employer does not have the authority to exercise the rights requested. The process of negotiating for the inclusion of a management rights clause could be used by the union to its own advantage -- by granting the college powers it already has, the union could gain substantial benefit, by trading that off for something else it wants.

But the opposite view is stronger to me. When drafting a management rights clause, care must be taken to avoid unqualified language that could curtail rather than preserve the rights of management. However, no agreement can anticipate all problems and contingencies that may arise under this provision. Now, of course, you could phrase it appropriately and say that the clause makes no attempt to cover all the rights of management. Actually, it is not simply for defending technical and legal rights alone; it is basically for protecting the authority and freedom of action that management must have to discharge its responsibilities. Many colleges don't have the power to enforce rights that are merely understood. Therefore, the clause can serve as tangible support in the event of a dispute or grievance because it is in black and white. Companies need as much contract protection as they can get and so do institutions of higher education. In day-to-day labor relations the management rights clause defines management's authority and that is invaluable to division chairmen and other supervisors who must administer the agreement, because it establishes their status.

The agency shop clause is perhaps more interesting, and I think we are going to be reading more and more about it in the future. Basically, the agency shop clause says that a fee must be paid to the bargaining unit regardless of whether or not you are a member of that group. If you're on a faculty that has a bargaining representative,

you must pay the fee either to the union or, in some instances, to a charity. This has been upheld in the courts in Michigan. The rationale behind it is that the individual reaps the benefit of representation since the group must represent everyone in the unit; so he should pay the same fee, as someone who pays it voluntarily.

The entire agreement or past practice clause indicates that the new agreement supersedes and cancels all previous agreements, or written, or based on alleged past practices, and constitutes the entire agreement between the parties. For example, if the election of department chairmen at the City University of New York is not mentioned specifically in the contract, is that or is that not part of current personnel policy practices? Faculty handbooks have organization charts and many procedures not found in the contract. Should these be subject to bargaining?

A grievance is defined as an allegation of a violation, misapplication, or misinterpretation of a specific provision of the contract. The grievance clause should define the limits of the arbitrator; otherwise he might establish policy. I find it very strange that faculty members would be willing to give up the final decision over educational matters to non-educators. Of course, from the viewpoint of the institution, advisory arbitration is better than binding arbitration; and the best clause would be advisory arbitration -- before the board of trustees makes the final decision. Thus, the final word is reserved for the board.

Finally, the labor agreement, as an instrument of law, should have these characteristics: it should be enforceable, it should have a specific duration, and it should be complete within itself.

Conclusion

There are many unanswered questions in the area of collective bargaining. What are management prerogatives? What is the nature of affiliation between the professional education organization and the non-professional employee's organization? What is the relationship between the college and the local fiscal authority? What happens when students seek involvement in the negotiation process? How much educational policy will become negotiable?

There is a wide-spread conviction, unfortunately, that faculty and administrative priorities tend to be incompatible. A clear dichotomy does not exist between faculty and administrative power, no matter how attractive a concept that may be in its simplicity. They are fused and dependent on each other. Moreover, distribution of power and in-

fluence in the community is diffused. An administration does not have as much power as is normally presumed. The board has some power; the commissioners or the local legislators have some power; and society in general has power. In today's large organization, a pervasive sense of isolation from the decision-making process seems to be one of the characteristics of the professional in industry and in higher education. We should involve him more directly in the decision-making process. Today we should recognize that "professionalism" includes bargaining. Administrators may have to put up with this in order to encourage a "professional" faculty because that is the way faculty members feel about themselves. We must be able to tolerate the ambiguities involved. The key question is -- is power a limited quality or can faculty members increase theirs without the administration and the board losing theirs? Militancy sows the seeds of its own demise, because it very frequently breeds success. Faculty members become satiated as they gain concessions; and they become incorporated more and more into the system. Disparities tend to disappear. History has often converted the value-laden ideological issues of one era into the institutions of the next era; those who doubt the value of the bargaining process might take consolation in that.

FACULTY UNIONISM AND TENURE

William F. McHugh

One supposes that every man and woman with the capacity to face reality--which eliminates most of us at once--recognizes that faculty unionism has arrived at a number of academic institutions and is likely to spread to others.

This is an essay on one aspect of its impact and is based upon personal experience, labor board decisions, and faculty collective bargaining agreements. The impact of faculty unionism on tenure can best be considered in the light of the following questions: What are the causes of faculty unionism? What constitutes a tenure system and what are the relevant problems it creates? What are the general elements of the collective bargaining process? Is tenure negotiable? From a consideration of these questions will come a perspective of understanding that will help the reader to expand or qualify the conclusions to suit his own experience and particular institution.

What Are The Causes of Faculty Unionism?

The decade of the sixties was a time for confrontations and changes in student relations, the seventies promise to be the hallmark of increased faculty unionism and militancy in faculty-university relations.

In a recent survey,[1] 60,477 faculty members were asked their opinion of the following statement: "Collective bargaining by the faculty members has no place in a college or university." The results were: 19.1% agreed strongly, 23.5% agreed with reservation, 33.7% disagreed with reservations, 20.4% disagreed strongly. Thus, 54.1% of those surveyed believed that collective bargaining by the faculty members has at least some proper role in a college or university.

As of July 1, 1971, there were approximately 130 colleges and universities where faculty have unionized. The majority of these are public community colleges.

Experience indicates somewhat rapid and widespread growth in public community colleges, state colleges, and state operated multi-campus systems in comparison to private. While recent experience in private colleges is inadequate to draw solid conclusions, it appears that union activity is likely to be slower and concentrated in the larger urban institutions.

The conditions conducive to faculty unionism are many; they have a bearing upon the theme of this essay and deserve brief mention here.

Institutional Complexity

Over the past twenty-five years Government sponsored research, social action programs, and the national commitment to mass higher education have combined to create large complex academic institutions shaped in the image of big business and governmental bureaucracy. Witness the large public multi-campus institutional systems which have been developing in New York, Wisconsin, Florida, Hawaii, New Jersey, and Pennsylvania. These byzantine systems have shifted the locus of decision making beyond the campus level.[2] Severe strains upon faculty relations result where local faculty governance organization exists only in a single campus context and does not interface with the developing system-wide organizational structure. There is an analogous problem between central administration and other component parts in the large single campus multiversity. Thus sheer institutional complexity presents a condition of frustration where there is an ineffective allocation of the decision-making process at various levels of the organizational superstructure. As frustration mounts, unionism becomes proportionately attractive to faculty as a concrete means for expediously factoring the professorial workforce into decision making at the appropriate levels of authority.

The Spirit of Confrontation

This is not new to those whose formative experience with faculty life took place in the sixties as graduate students or junior faculty. Indeed, the sixties have endowed the seventies with collective attitudes conditioned to the adversary and power relationships contemplated by the bargaining process. Nisbet said the centrifugal changes in the past decade have caused an ungluing of traditional academic relationships.[3] The profound shift from *gemeinschaft* to *gesellschaft* has been accompanied by a cult of "do your thingism" which has fragmented the academic community. Some institutions seem no longer bound together by a common value system marked by informal concensus, but seem instead to be a reflection of an urbanized composite bound together by interests characterized at times by inflated talk of "power" this and "power" that. In the name of "student power" lawsuits are brought to challenge institutional policies on such matters as admissions, expulsions, and the use of institutional funds. Interest groups on campus such as blue collar and clerical unions, feminist organizations, varieties of liberation fronts, civil rights groups, and rightists, all press on for their "rights", too. Vigorous interest group representa-

tion and confrontation is not new on campus. Unionism appeals not only to those interested in confronting college decision-makers but also to the true believers and the captives of causes.[4]

Faculty Under Attack

Encroachment upon faculty autonomy comes from different quarters. Internally, student press for participation in academic senates, departmental affairs, curriculum matters, and sometimes in the jealously guarded faculty evaluative process itself. With the break-down of traditional organizational forms and communication so dependent upon consensus and shared values, restructuring of traditional governance models became an addiction in the late sixties. The direction has been toward senates and assemblies representative of the broader academic community, and typically provide for enlarged student participation. Indiscriminate tinkering with traditional faculty governance machinery has left the faculty at some institutions without a forum unencumbered by non-faculty.

Egalitarianism and "participatory democracy" have created a fundamental tension with the university's aristocratic tradition. The faculty guild as a privileged enclave is implicitly challenged by the student movement. While there may be wholesale acceptance of student control over student affairs, student participation in academic program and faculty evaluation matters may be perceived by faculty traditionalists as an intrusion upon faculty autonomy.[5] "Consultation yes, but formal structuring into the academic committees as near equals, no." The appeal of faculty unionism lies in the fact that it has many of the guild features associated with more traditional faculty organization. That is, it forecloses students who do not share a "community of interest" with faculty.[6] Faculty unionism may well be on a collision course with the newly emerging tri-partite governance schemes. A priority item in faculty-university relations will be to minimize this tension.

External attacks upon faculty autonomy and general public dissatisfaction are evidenced by state legislatures which have thrown down the gauntlet; statutory mandates to increase workload (Michigan), to declare moratoriums on sabbatic leaves (New York), to require dismissal rules and procedures (Ohio), yearly rejection of faculty salary increases (California). More subtle external encroachments are also evidenced by state and local governmental agencies which are becoming more involved in academic decision making mainly through the budgetary process.[7] It is rationalized on the basis of "accountability." Such intrusions upon the normal academic decision-making process has no doubt alienated faculty. There is a growing currency to the notion that to provide the

proper balancing of equities and the best use of institutional resources in order to serve the public, universities will have to be "managed," managed like the industrial giants, like big business. Large state institutions typically have Midas-size budgets and, politically speaking, reach into a wide range of communities. Pressures to manage from the legislature and the executive increase in proportion to the economic size and political influence of the institution. Unfortunately, a simple administrative truth sometimes becomes obscured: faculty cannot be effectively managed without a high level of voluntary cooperation, motivation, and professional responsibility. Managerial vigor by the dead hand of bureaucracy can widen the growing gap between faculty and administration and result in some interesting non-sequiturs. "If you are going to treat us as mere employees, we must unionize to prevent it." The call for solidarity is a reaffirmation of the professorial guild in the face of attack from within and without.

Fiscal Restrictions

The call for managerial accountability is, of course, related to the present financial restrictions. Program retrenchment and elimination of faculty positions decreases mobility and makes job security a major issue for untenured faculty.

Reallocation of institutional resources and decisions affecting program cuts will become sensitive battlegrounds and competition among internal groups for institutional resources will produce general discontent. The entire institutional decision-making process on such matters may have to be overhauled in order to establish credibility and compromise among the constituent parts. This is true of private as well as public institutions, although it will be far easier to accomplish in the former. This is highlighted in a recent report of the Carnegie Commission on Higher Education which has called for a cut in operating costs by 10 billion dollars a year. The report said, "[Faculty] unionization becomes more likely as faculty members face some unpleasant changes . . ."[8] Tight money will force a re-examination of fundamental premises behind faculty-university relations which have been taken for granted over the past few decades. Unionism promises one route in an effort to change the process by which institutional resources are allocated.

The open university and tight money has also created talk of degrees by examination, dramatic changes in the time requirements to obtain a degree, increased off-campus study, and greater use of instructional technology. This will mean a redefinition of workload, curriculum content, admission standards, and new schemes of faculty compensa-

tion and incentives. Institutional cooperation will become an economic imperative and institutional mergers or affiliations could entail a redefinition of authority systems and lay-offs. If the fiscal forecast of the Carnegie report is accurate, then institutional well being and even survival during the seventies will depend upon a greater type of managerial "control" over the internal decision-making and budget process similar to techniques and procedures in a business enterprise. Pressures in this direction are already being felt. This will challenge traditional academic schemes in which the faculty have vested interests; it is likely to create conditions favorable to faculty unionism.

External Organizations and the Legal Right to Bargain

The legal right of public employees in certain states to organize and bargain has enhanced organizational activities by AAUP, AFT, NEA, and their state affiliates. New York, Michigan, New Jersey, Massachusetts, Pennsylvania, and Hawaii are persuasive examples of the close relationship between faculty unionism and state public labor laws and the growth of public employee unionism, especially school teacher unionism. Pending legislation in the states of Washington, Illinois, Florida, and possibly California suggests potential widespread faculty unionization in these states.

School teacher unionism has resulted in greater teacher participation in educational policy matters heretofore reserved to school boards. This has undoubtedly had a persuasive impact upon community college faculty. There has also been well publicized gains by state and local government workers' unions. In the face of these events, many public faculty are likely to view unionism as a matter of practical necessity in order to compete with the public employee unions for public funds at both the state and local government level.

Faculty unionism has also been promoted by the three national external faculty organizations: AFT, AAUP, and NEA. By external organization I mean those which do not form an integral part of the institution's governance structure such as senates or an independent association of the local faculty. The three external organizations have dominated the union movement with little or no significant gains by independent faculty unions or associations.

At its Fifty-Eighth Annual Meeting in May 1972 the AAUP voted to pursue collective bargaining and to "allocate such resources and staff as are necessary for the vigourous selective development of this activity beyond present levels."[9] AAUP's full commitment to unionism is likely to encourage increased organizational activities in private institutions.

In the hurly-burly of union organization, external organizations have a practical appeal and are better equipped financially to organize and promote collective bargaining than are local groups. Governance organizations are also limited especially where they may be comprised of students and others who do not share a "community of interest" with faculty in a collective bargaining representational sense. Labor relations acts are tied to employment status and will not permit representative organization unless there is a community of interest among the employees to be represented. External organizations have the money, trained staff, lawyers, and other resources necessary to organize, campaign, and to utilize the legal machinery of labor acts. Conducting an organizational drive to unionize faculty requires both experience and skill in the rough and tumble of political and organizational behavior. External organizations often focus upon a personalized type of service by representing the particular cause of an individual faculty member. Governance or faculty council machinery is frequently oriented toward achieving group consensus and not to redressing specific individual problems *vis-a-vis* the group. Many academic institutions simply have no workable grievance machinery at all.

Organizational efforts by one organization serve as a catalyst for the other two or three on campus and it becomes a matter of organizational one-upmanship with survival at stake. The litany of organizational campaign is clear and to the point. It advocates:

1. Ability to lobby for the good of education in the legislative halls and with the executive, to oppose legislation which attempts to unilaterally increase workload, eliminate tenure, or sabbatic leaves;

2. Guarantees of due process in dealings with the administration and preservation of academic freedom;

3. Faculty consultation in all matters, and insistence upon participation in the institutional decision-making process concerning: budget and allocation of resources, access to the trustees, formalized procedures for consulting with the President;

4. A grievance procedure through which to challenge arbitrary administrative acts against faculty with binding arbitration by an impartial third party;

5. Eliminate unreasonable workloads;

6. Salaries should keep pace with the cost of living;

7. Fringe benefits and retirements comparable to industry and government;

8. Improvement of facilities, office space, and secretarial services.

With all of the external organizations aggressively promoting unionism on campus, a steamroller effect is quickly built up.[10]

In summary, the conditions conducive to unionism represent a confluence of factors: complex institutions in dynamic transition with dislocated structures and authority patterns; some faculties' conflict oriented; attacks upon the faculty guild; economic restrictions creating job security issues; external pressures to centralize and manage; legal right to collectively organize and bargain, and promotion of collective bargaining by external organizations.

The Major Features of a Tenure System and One of its Central Problems

There are three coordinate elements in a tenure system. First, it enables a faculty member to teach and study free from a number of restraints and pressures which would otherwise inhibit independent thought and action. In this sense, tenure is part and parcel of academic freedom. Robert Hutchins said that academic freedom comes and goes because of some conviction about the purpose of education on the part of those who make the decisions in society. Hofstadter and Metzger said the modern idea of academic freedom has been developed by men who have absorbed analogous ideas from the larger life of society: modern science's notion of the empirical search for truth verified by objective processes; from commerce the notion of free competition of ideas; from the politics of the liberal state the idea of free speech and free press essential to perspectives in a pluralistic society; from religious liberalism the "taming of sectarian animus" and the spirit of tolerance. Academic freedom is not a license for privileged social status on matters unrelated to teaching and research.

The second element of tenure, closely related to the first, derives from the fact that it represents a kind of communal acceptance into the professorial guild, acceptance by one's peers. Rooted in the medieval guild, it entails a vow akin to the ministry or priesthood, with a corporeal allegiance to the differential honor inherent in teaching and scholarship. Hence, the very term "professor." It is no doubt the understatement of the day to say this aspect of tenure presently seems in eclipse at many institutions.

Third, tenure is a means for providing job security to promote in-

stitutional stability, loyalty, and to reward individual service and accomplishment. This is comparable to job security in civil service and industry and not at all inconsistent with notions of subjection to institutional criteria of efficiency and productivity that are the lot of other workers and professionals in our society.

Tenure Systems

There is by no means a uniform tenure system in higher education. Some institutions have no system of tenure at all and the faculty serves at the pleasure of the institution. Others have *de facto* tenure policies that have developed through practice and custom but which are not written down. In some public institutions, typically state teacher colleges, tenure may be detailed in statutory law which forms part of the tenure system prescribed for school teachers. While in other public institutions the state legislature has delegated statutory authority to the college governing boards which have in turn promulgated detailed tenure systems. The latter is generally the case in the major public institutions. Other institutions have highly detailed policies with elaborate notice requirements; in still others the board of trustees have simply endorsed or imported the AAUP tenure policies or guidelines.[11]

In spite of this diversity, most tenure systems may be described along the following lines. There are usually two basic types of academic appointments relating to tenure. These are term appointments which confer security against dismissal for a fixed term, and continuing appointments conferring such status for the life of the professor while at the institution. Both are subject, of course, to formal dismissal proceedings for cause. The tenure provisions are typically spelled out in written trustee policies or faculty handbooks adopted by the college trustees. These usually require a tenure decision one way or the other after a prescribed period of service at the institution, for example, after seven years service. Therefore term appointments may not be indefinitely piggybacked to the detriment of the individual and to the tenure system itself. Written institutional policies frequently tie prescribed notice of non-renewal requirements to term appointments; the longer the service, the longer the notice requirement. Thus there might be six months notice for two year appointments or a year's notice for three or more year appointments. In some cases, written trustee policies of the institution will establish broad promotional criteria such as teaching, scholarly research, mastery or subject matter, university service.[12]

Faculties and individual departments supplement and apply these criteria to the particular tenure review case. The tenure appointment

review process characteristically entails a pyramid of reviewing committees originating in the academic department and culminating with a recommendation from a campus-wide committee to the president who presents it to the governing board for approval. The campus-wide committees which review departmental committee recommendations usually include deans or academic vice presidents. These procedures should be distinguished from the board promulgated policies or by-laws. The board policies generally cover the type of appointment, the notice requirements, eligibility standards, and general promotional criteria. The procedures implementing board policy are frequently developed by department, faculties, and schools and usually not passed upon by the governing board. Such procedures are a combination of written policy and *de facto* practice and tailored to the special needs of the faculty or departments involved. Sometimes, however, trustee policies or by-laws will expressly delegate an advisory or consultative role to the faculty in the appointment and promotion process. In some institutions, faculty might even be delegated authority in the institutional by-laws by the board to establish and apply the criteria upon which tenure is awarded.

Once a budgeted position is established, the *de facto* decision of appointment, reappointment, or tenure is as a practical matter a faculty decision. Nonetheless, in the American university the *de jure* authority to grant appointment and tenure is almost always vested in the trustees by statute, charter or by-laws, depending upon whether the institution is public or private. Despite this ultimate legal control, rejection of a faculty recommendation is probably the exception rather than the rule. This might become less true in the future in the face of financial restrictions and forced retrenchment.

In addition to policies relating to appointments and promotion trustee policies frequently make provision for dismissal of faculty. It is necessary to digress for a moment to note the distinction between the tenure review process just described and a dismissal proceeding. There is a difference between a tenure review resulting in the expiration of a term appointment and separation from the institution on the one hand and a dismissal from an institution on the other. In the latter, the institution brings a charge of inadequate performance of duties, incompetence or misconduct with the clear design of ridding itself of an undesirable. Such a proceeding may be brought during the term appointment of term appointees or against a tenured faculty member. It typically requires notice and a formal adjudicatory hearing, usually with right to counsel. The hearing is frequently before a faculty committee which makes findings of fact and recommendations to the president or board. It is likely to be an adversary proceeding concerned only with the issues raised by the charges. By contrast, a tenure review is concerned with whether or not to grant tenure in the light of the departmental or academic program

needs, prevailing economic and budget considerations, the qualities of the particular candidate, and the existing job market. Tenure review obviously never applies to a person who already has tenure whereas a dismissal proceeding could. Separation from an institution because tenure was not granted theoretically carries no professional stigma, dismissal for cause clearly does. One of the purposes behind a dismissal procedure is to protect the academic freedom of the tenured faculty member and those on term appointments. A dismissal proceeding insuring due process is a fundamental element in any academic tenure system but is generally not equated with the tenure evaluative review process which has different objectives. Frequently administration and faculty fail to keep this distinction in mind where there is a confusing factual situation.

There has been growing pressure by faculty during the past four years or so to develop some means to permit an individual to appeal and review an adverse tenure decision. One reason for this pressure is no doubt the shrinking job market and economic cutbacks. A more fundamental reason is because there is a twofold purpose behind a term appointment which establishes a fundamental tension between the individual and the grantor of the appointment. One purpose is simply to get a particular job done at a certain time. It carries no guarantee that the appointment will be renewed or ripen into tenure. Another purpose, however, is to provide an opportunity to evaluate a potential candidate for tenure. In this sense it has a probationary feature and can carry an element of expectancy with it.

These two aspects of a term appointment will, of course, receive in any given case varying degrees of emphasis depending upon intentions of the parties at the time of initial appointment, age and rank of appointee, length of service, the type of institution, school, department or program within which it was given. One view characterizes a term appointment as fundamentally a contractual obligation on the part of the institution for the term period in return for services rendered by the faculty member. Admittedly, an individual may be considered for a continuing appointment at some future point, but this view holds there is no implied expectancy of employment nor even a moral obligation inherent in the term appointment relationship itself guaranteeing that it will mature into a continuing appointment. It says the individual is fully protected where there are notice requirements and where a tenure decision is required after a prescribed period of service. When an individual receives notice that his appointment will not be reviewed upon expiration, it does not necessarily follow that he is inferior, lacking or has done something wrong. On this reasoning there is no obligation to give written reasons or a hearing to an individual whose term appointment has been non-renewed in the absence of an institutional obligation to enter a new agreement (i.e., renewal of appointment).

This traditional approach to the term appointment emphasizes a strict contract relationship: the appointment was mutually agreed upon between the individual and the institution to terminate at the expiration of the fixed term subject only to institutional policies requiring a tenure decision after a prescribed period of service. This is rationalized on the basis that it facilitates the pursuit of institutional excellence by insuring institutional flexibility to react to: economic realities, desirable market conditions, access to higher quality faculty, shifting emphasis in academic programs. From the faculty point of view it gives job security for a fixed term, opportunity for self-development by leaving open the opportunity for promotion to a continuing appointment (tenure) and provides security against arbitrary or unlawful dismissal during the term of the appointment.

This view of the term appointment has been attacked by many faculty and faculty organizations as both subjective and elitist, institutionally oriented, with no provision challenging non-renewals founded upon unlawful, capricious, subjective, or punitive reasons. They ask at the bargaining table: Why not tell a man why you are non-renewing his appointment, why not give him an opportunity to improve? Why after seven years is he suddenly undesirable? Have you no obligation to him after years of service to your institution; are you just going to turn him and his family out into the streets? Shouldn't there be at least some "due process" procedure to ascertain whether or not he was non-renewed for capricious, unconstitutional, or irrational reasons? There lies behind this argument an underlying view that emphasizes the probationary aspect of the term appointment, the job security aspect. Assuming a term appointment, it is reasoned that the individual is on a tenure track leading to a continuing appointment at the institution from the moment he is appointed. The argument is that where the university has policies relating to notice requirements and requires a tenure decision after a prescribed period of service, it follows that an initial term appointment may create an institutional obligation to grant tenure if certain conditions are met. Some go so far as to say there is an implied obligation on the part of the institution to grant tenure provided the individual does not do something wrong or fails to measure up to expressly articulated institutional standards. It is further argued that in cases of non-renewal denying tenure, the burden should logically shift to the institution to show the reasons for non-renewal or to state reasons which will show where the faculty member has failed to measure up to expressed institutional criteria and therefore denied a continuing appointment otherwise available. The differences of these two approaches are not that clear cut, but are merely so presented here as a means of pinpointing the problem.

It is not suggested here that the two views are always mutually

exclusive; the emphasis will shift depending upon the circumstances. For example, a person arriving at his seventh year may well have a greater claim or expectancy of tenure especially where there has been a pattern of promotion and a series of salary increases. In the latter case non-renewal raises the presumption in the mind of some that there was a wrongful reason behind the non-renewal.

Some consider failure to give reasons for non-renewals the equivalent of dismissal for cause but depriving the individual of due process normally provided in a dismissal proceeding. This argument is often made in cases where an institution or faculty appears to be ridding themselves of a "trouble-maker" by merely waiting out the expiration of his or her term appointment or where the particular candidate is controversial, or where circumstances suggest an arbitrary or capricious decision.

Accordingly, it has been advocated that equity calls for the submission of written reasons for non-renewal to the faculty member who has not had his term contract renewed or who has been denied tenure. Pursuing this reasoning, there must also be a forum for challenging tenure decisions. Thus there is a growing felt need on the part of some faculty to resolve the matter by imposing a review committee to insure that institutional "procedures" used in reviewing a candidate were properly followed, especially where policies are unclear and implementation of policy slipshod. Thus, a candidate who feels wronged can trigger a review of the tenure decision before an impartial committee which will presumably limit its scope of review to the question of whether or not the appropriate evaluation procedures were followed. [13]

I speculate that this concern on the part of faculty is a complex mixture of numerous factors and relate to some of the previously mentioned general conditions which encourage unionism. There is the egalitarian mistrust of traditional and aristocratic styles allegedly manifest in subjective and "clubby" tenure practices. There is the faculty generation gap and the growing involvement of students in faculty evaluation. At certain types of educational institutions, there are faculty who look upon tenure largely in terms of job security. This is exacerbated by fiscal constrictions and poor job markets. In some institutions affluence and too rapid expansion has made tenure in the sixties, cheap and easily attainable. It has also bred loose and shoddy evaluative practices. Easy tenure at some institutions has instilled in the candidate a proprietary sense or right to tenure. The temper of the times with its paranoic undercurrents of mistrust and suspicion has created pressure for greater formality and "due" process, more rules, procedures, and protections. There seems to be less confidence in the tenure evaluative process which has in turn opened it up to greater faculty criticism. Accordingly, the AAUP has recently been concerned with the problem of developing a procedure affording maximum evaluative flexibility

with rather broad exercise of peer group discretion to preserve high academic standards while at the same time harnessing that discretion to prevent capricious or unlawful abuse of the evaluative process in cases of non-renewal of term contracts.

There has also been a rash of court cases[14] concerned with the problem and underscored by two recent decisions of the U.S. Supreme Court in the Roth and Sindermann cases.[15]

The Characteristics of the Bargaining Process

For purposes here there are four general characteristics of the bargaining process which should be kept in mind. First, it clearly contemplates an adversary relationship and assumes a divergence of faculty and institutional interests raising the possibility of a power struggle. In private institutions which are covered by the NLRA and public institutions in states where there is partial authorization for strike (Pennsylvania and Hawaii) the ultimate weapons are the threat of strike on the one hand and employer willingness to take a strike on the other. In most public institutions where the strike is not authorized by state law, it is more typically the threat of confrontation by resort to an impasse mechanism culminating in a public fact-finding report which may gain the political support of the public, an important factor in public sector labor relations. It is important to note that the adversary relationship assumes a well defined dichotomy between those managing the institution and the faculty. This is based upon the theory that it is management's responsibility to set and pursue institutional objectives. The bargaining agent's objective, whether rationalized on the basis of what is best for the institution or not, is to further the collective interest of the faculty it represents and to circumscribe managerial authority to that extent. Thus it assumes that the faculty interests may be at odds with the institutional objectives and priorities of those established by external governmental agencies in the case of public institutions.

Second, implicit in the adversary relationship is the assumption of a bilateral relationship. The NLRA and most state collective bargaining laws increase the faculty's legal status by requiring the university to recognize the exclusive representative status of a duly elected faculty bargaining agent and to bargain with it in good faith. This does not mean agreement has to be reached. Implicit in bilateralism is the assumption of a two party contractual relationship between the faculty and the university. Therefore at a unionized campus the general framework and many incidents of the faculty-university relationship will be established in a negotiated contract and during contract implementation. By comparison, board policies governing faculty-university relationships at non-

unionized campuses are, legally speaking, unilaterally established, i.e., there is no legal right in the faculty to bargain them. Of course, as a practical matter at many institutions, faculty have in fact "collegially negotiated" through traditional governance channels board policies relating to faculty-university relations.

Third, the collective bargaining process is premised upon a collective relationship: organizations of employees sharing a community of interest represented "exclusively"[16] by an elected representative. Competing organizations may thus be excluded from negotiating with the institution and are relegated to a backseat status on major institutional issues. It is a democratic process in the sense that everyone in the bargaining unit has an equal opportunity to vote upon who the bargaining agent shall be or whether or not there shall be bargaining, including non-tenured faculty. The agent is dependent upon, and must be responsive to, the majority of those it represents with no legal obligation to make distinctions within its own organization based, for example, upon such things as academic rank or senior faculty status. This is critical where, say, the majority of faculty in the bargaining "unit" do not have tenure.

This collective relationship stresses the dynamics of politics and organizational behavior which become major factors in faculty-university relations and which may reach beyond the campus. This is especially true of an elected bargaining agent affiliated with national or state organizations possessed of legal, financial, and other staff organized and financed to confront institutional action or directives and policies in the courts, legislative halls, or otherwise. The character of faculty leadership is likely to change as a result of this collectivism. It will require considerably more investment of time with increasing emphasis upon an institutional perspective of faculty-university relations rather than of a single faculty, school, or discipline. It will require a leadership of individuals comfortable and able to lead in a political context and who must be more attuned to the majority of its constituents.

Where there is an affiliation between the local faculty bargaining agent and an external organization, the local bargaining agent and its constituents will be influenced by the organizational policies of its national and state affiliates and more than likely be administratively meshed with them.

Fourth, most systems for resolving conflict depend upon third party neutrals when efforts at mutual accord break down. The bargaining process is no exception and relies upon mediation, fact-finding, and arbitration to resolve impasses during contract negotiations or grievance impasses arising from the administration and application of the contract. In theory, the objective of a third-party mediator is to persuade the

parties to mutually resolve their differences, a marriage counselor. Arbitration is a more formal adjudicatory proceeding resulting in a determination on the merits of the impasse issues by written decision which may serve as a precedent for comparable future issues. Arbitration decisions in other labor disputes may serve as precedents in analogous faculty-university disputes and thus influence the arbitrator's decision. For example, arbitration decisions in school teacher cases, or the arbitrators own personal experience in school teacher matters will influence decision, say in community college faculty disputes.

Binding arbitration, as contrasted to advisory arbitration, means the parties will be bound by the arbitrator's decision. Binding arbitration is relatively common as the terminal step in a grievance system (grievance arbitration) but less commonly used to resolve impasses arising during the negotiations themselves (interest arbitration) especially when there is the right to strike. Parties are frequently reluctant to be bound by an arbitrator's decision on a negotiation impasse issue where the strike leverage is available.

Fact-finding is for practical purposes the same as advisory arbitration and often utilized in the public sector in negotiation impasses where the strike is not authorized as in New Jersey and Michigan. The theory behind fact-finding is that publication of the fact-finder's report clarifies the issues and informs the public and legislative decision-makers. It gives the parties an opportunity to assess the public reaction to their respective positions and provides a cooling-off period. Since the legislative body makes the ultimate decision, the theory is that while the fact-finder's report is not binding, it places public pressure on the parties to settle their differences or upon the legislative body to accept or reject the fact-finder's report.

Third party neutrals are usually selected by the parties themselves or appointed by a public employment relations board, or some conciliation service, from panels of experienced mediators, fact-finders and arbitrators. Thus, private institutions are likely to resort to the Federal Mediation Service or the American Arbitration Association while public institutions are likely to be dealing with state-board controlled conciliation services.

Will Tenure Matters Be Negotiable?

Environment Conducive to Tenure Negotiability

For a number of reasons a tenure system is likely to be a major negotiable issue when faculty unionism arrives on campus. Many of the conditions conducive to unionism are the same as those which encourage tenure

negotiation. The Roth and Sindermann decisions will likely increase pressure by faculty to negotiate contractual rights to written reasons for non-renewal of term contracts and review procedures patterned after recent AAUP policy. At institutions with a high concentration of non-tenured faculty the bargaining agent will be under considerable political pressure to deliver on job security, especially where economic constrictions threaten job mobility. This would surely be true at institutions where there is no system of tenure at all.

However, the underlying pressure to negotiate tenure has its source in two problems which arise when applying the bargaining process to academic institutions. One is the difficulty of dichotomizing the management rights function from the professional responsibility of the faculty which is required by the adversary relationship inherent in unionism. In the crudest terms, it forces a more precise response to the question of who is going to run the institution as to what matters and upon what terms? Second is the predisposition of faculty themselves to seize upon unionism as a kind of governance system to effect institutional decision making. The two are closely related. There is a widely held view by faculty today that they should have wide discretion in the conduct of their professional activities and to have some form of "shared authority" in the governance or formulation of institutional policies. This notion has gained momentum over the past twenty years during a time of unusual faculty autonomy. But it has roots reaching down to the medieval guild and the universities' corporate status which enjoyed a "liberty" in medieval times. Faculty have historically evidenced a proprietary sense in the institution and have lived in it as a community. The notion is part and parcel of academic freedom and institutional autonomy. When aggressively pursued, the commitment to shared authority projects into the bargaining relationship a much wider spectrum of matters than customarily associated with private industry or public sector collective bargaining where the distinction between management's function and that of the employees is more clearcut. Forced to draw lines between management and faculty rights, the collegial tradition paradoxically tends to draw a broad range of issues, many noneconomic, into the bargaining process. A study by the American Association for Higher Education found:

> "... our field studies do not indicate that economic factors *per se* have been an important consideration underlying recent expressions of faculty unrest... A meaningful application of the concept of "shared authority" should involve a wide variety of issues. The issues include educational and administrative policies; personnel administration; economic matters ranging from the total resources available to the compensation for particular individuals, public questions that affect the role and functions of the institutions;

and procedures for faculty representation in campus governance..."[17]

This is also reflected in the American Association of University Professors, October 1969 policy statement recognizing the "significant role which collective bargaining may play in bringing agreement between faculty and administration on economic and academic issues." The AAUP policy says that the negotiation of a collective agreement may "provide for the eventual establishment of necessary instruments of shared authority."

Accordingly, all three national faculty organizations reflect in their campaign literature and bargaining agreements a concept of negotiable issues covering a range of matters touching on admissions, class size, workload, calendar, procedures for budget formulation, participation in institutional planning and allocation of resources, procedures for the selection of certain administrators and department chairman, traditional economic items and last, but not least, tenure matters.

The legal environment offers no major obstacles in negotiating aspects of tenure. The NLRA and most state public employment relations acts typically permit negotiations with respect to salaries, wages, hours, and other "terms and conditions of employment". The question is what constitutes "terms and conditions of employment" with respect to faculty in a college or university. In other words, what is the scope of negotiation? There are no reported decisions which have squarely faced the issue of whether or to what extent a tenure system might be negotiated. It is fair to generalize, however, that matters relating to job security have traditionally been considered within the definition of terms and conditions of employment under most collective bargaining laws.[18] Generally speaking, scope of negotiations has been liberally construed to include in the bargaining process a variety of matters of logical concern to effected employees.[19] However, the mere fact that a tenure matter is permissively negotiable under a given labor statute does not mean it has to be in fact negotiated or if negotiated that agreement has to be reached. All that is required is that the parties negotiate the issue in good faith. It is left for the parties to work it out between themselves.

Practice Shows Tenure Negotiable

Accordingly, scope of negotiations is determined also by actual practice and experience between the parties as to what classes of issues have been in fact negotiated, agreed upon, and provided for in the contract. While written negotiated agreements are not coterminous with scope of negotiation, they do represent accessible documentation on the practice in

the field. Negotiated agreements at the community college, four year institutions, and university levels indicate that faculty are negotiating a tenure system with contract provisions covering matters such as: a systematic means of awarding term appointments with prescribed notice requirements; specification of evaluation criteria; an evaluation procedure including promotion committees and their composition; access to and content of personnel files upon which promotion and tenure decisions are based; the requirement of written reasons in nonrenewal cases; academic rank ratios; a procedure for appealing tenure decisions; a dismissal for cause procedure; and an institutional commitment to principles of academic freedom usually contained in general contract provisions.

For example, academic freedom language in the contracts, frequently couched in general terms, takes the following line:

> "All parties to this agreement recognize the importance of academic freedom to the fulfillment of the College's educational purposes and therefore endorse the 1940 Statement of the American Association of University Professors on Academic Freedom." (Dutchess Community College, New York)

or:

> "It is the policy of the College to maintain and encourage full freedom within the law, of inquiry, teaching and research. This freedom shall include the right to belong to any legal organizations and to promote such organization, and to hold and make public any view or opinion involving, but not limited to, social, economic, political and educational issues." (Fulton-Montgomery Community College, New York)

or:

> "The parties incorporate herein by reference the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors in accordance with the endorsement of the Board of Trustees of the University on January 15, 1968." (St. John's University)

or:

> "During the life of this Agreement the University-wide policies on the following matters shall be changed only after special conference:
>
> 1. Academic Freedom
> 2. Academic Tenure
>
> ..." (Central Michigan)

With respect to community colleges the foregoing conclusions are supported by a January 1971 survey of twenty-two New York Community College contracts and a 1969-1970 survey of twenty-four Michigan Community

College Contracts as well as the Chicago Community College system agreement. New York and Michigan provide the majority of community collective bargaining experience. Because there is nothing to suggest otherwise, it is fair to conclude that the trend to negotiate tenure in unionized community colleges will continue especially where there are authoritarian administrative styles, no tenure system, or where tenure is largely dependent upon informal practice.

Experience in the four year colleges and universities is somewhat less extensive but developments so far show little difference from the community college agreements in regard to negotiation of tenure provisions. These also include contract provisions covering tenure notice requirements, evaluative standards, academic freedom, evaluation procedures, retrenchment, rank ratios, academic titles and ranks, dismissal procedures, personnel files. In some respects these agreements consistently cover a wider range of related tenure matters than do the community college contracts.

Given negotiability of tenure, contract administration will no doubt involve a wide range of complicated and subtle relationships relating to tenure. For example, student or faculty senate interests in evaluation and promotion committees, personnel file guidelines, the validity of departmental guidelines on promotion and tenure; study committees on faculty personnel matters, will all somehow have to be related to the bargaining relationship on unionized campuses. The faculty bargaining agent will no doubt play a prominent part in such matters. All of this is, of course, somewhat speculative at this point because there are no available studies concerning the impact of contract administration upon tenure.

The Implications of Tenure Being Negotiated

Governing Board Tenure Policies Negotiable

It is also clear from experience that faculty are negotiating into the contract the status of existing written tenure policies of the governing board. (i.e., St. John's, SUNY, Boston State). Accordingly, the collective bargaining agreement can in practical effect bake into the contract those portions of the board policies relating to tenure (St. John's contract), or possibly be interpreted to require reopened negotiations on Board tenure policies when such policies are intended to be changed by the trustees (SUNY contract), or actually incorporate by reference institutional policies relating to tenure such as academic freedom provisions (Rutgers). Thus unionized faculties have been seeking by expressed negotiation in the contract to preserve favorable existing institutional policies concerning tenure or to negotiate desired changes in them. The

net effect is as though they were negotiated *de novo*. An open-ended provision allowing considerable latitude to faculty in this regard can be illustrated by language taken from an agreement which contractualizes a broadly-defined *status quo*, as well as existing tenure policies.

> "The parties agree to continue all practices of the administration currently adhered to by it. 'Practices' refers to those practices of the Office of President, Offices of the Vice Presidents, Offices of the Deans, based upon written policies of the Board of Trustees and the University Senate... All of the provisions of the Statutes presently in effect relating to tenure and promotion remain in full force and effect with the following modifications: (then follows contractual provisions which qualify the foregoing). (St. John's University)"

Changed Legal Relationship

Where tenure matters are negotiated the result will change the fundamental legal relationship between faculty and the institution. At many institutions favorable changes in tenure policies have resulted in the past from faculty pressure for improvement or to enhance the institution's recruitment efforts. Such policies were developed during a time when political and financial constraints upon the institution were not significant. Many of the tenure provisions were predicated upon AAUP policy.

In public institutions tenure rules or policies promulgated by action of the governing board of the institution have the force and effect of administrative regulations and are not usually considered as contractual rights as such. They may be changed or eliminated by similar action of the board. Collectively speaking, the faculty have no legally vested right to prevent a change in the policies. But where there is an authorized bilateral agreement collectively negotiated between the faculty and the public institution, the legal relationship is one of contract and it may not be unilaterally changed by the governing board during the contract term.

The fundamental legal relationships with respect to tenure matters between a faculty member and a private institution have always been contractual in nature and derived from the letter or form of appointment and read in the light of existing institutional policies. However, unionism will likely result in establishing tenure relationships through the collective agreement rather than ugh an individually negotiated agreement. This is also true of the publi- stitutions. To some extent, a collective agreement disenfranchises the .idual faculty member from negotiating his own comprehensive contract. On the other hand, it is doubtful that is

has ever been the widespread practice to negotiate individually, apart from salary, a comprehensive agreement relating to tenure matters. Most agreements or letters of appointment characteristically recite the salary, rank, and length of appointment with specific reference to institutional policies regarding tenure in the faculty handbook or trustee policies. In private institutions so-called individual contracts in the majority of cases are contracts of adhesion and are tied to already established institutional policies. The individual has no negotiating leverage over these. Depending on the policies and form of appointment, the institution may well have the right to unilaterally change its tenure policies without causing a breach of individual contract.

Many of the collective bargaining agreements so far prohibit individual faculty contracts from being inconsistent with the collective agreement. Depending upon the collective contract salary provisions, this does not necessarily preclude an individually negotiated salary arrangement although it seems rather unlikely. I speculate that the effect of collective bargaining in both public and private institutions will be to diminish if not eliminate the individual contract concept and to shift tenure matters from the board policies to the collective contract itself. This will reduce the flexibility of the Board to unilaterally change such policies during the term of the collective bargaining contract. It will also diminish flexibility to adjust individual problems outside of the collective bargaining agreement.

Increased Bilateralism in Tenure Matters

If collective bargaining trends so far suggest a business-like and detailed litany of tenure rights spelled out in the collective bargaining contracts instead of in policies, handbooks, written interpretations, or everyday practice, it is reasonable to assume that there will be a tendency to homogenize practices relating to tenure and reduce discrepancies in practice between departments, schools, and faculties. Unilateral flexibility by the institution and its subdivisions to change signals with respect to appointment and tenure because of economic or other considerations will be reduced in both public and private institutions where existing policies and the *status quo* become baked into collective bargaining agreements. For example, institutional attempts to limit all new term appointments to one-year with a practice of one-year roll-overs will be resisted at the bargaining table where the majority of faculty are non-tenured.

Likewise, a series of non-renewals to take advantage of favorable market conditions may result in efforts to establish rank ratios, impose rigorous review procedures on non-renewals, and faculty demands for a policy of "promotion from within." Retrenchment of "fat programs" will result in pressure for contract retrenchment criteria with, perhaps, built-in seniority concepts tied to tenure status.

This is not to say that collective bargaining will necessarily mean institutional inertia. Quite the contrary, bilateralism implicit in the bargaining process if knowledgeably handled can work as a constructive force. The process lends itself to mutual problem solving, and can result in a more disciplined presentation of detailed personnel data necessary to informed institutional tenure policies, and cultivates an institutional perspective on the problem of tenure.

In the absence of bilateral checks, fiscal crunches can result in haphazard and *ad hoc* decisions relating to personnel and cause a breakdown in faculty trust. Confronted with this bilateralism in terms of the daily nitty grittys, institutions will have to be better prepared to rationalize and justify decisions and policies relating to tenure. This is especially true with respect to retrenchment and in the faculty evaluation process.

Management Rights, Growing Managerial Attitude

The rule that every action has an equal and opposite reaction may well apply at some unionized institutions. Bilateralism is a two way street and the scope of negotiations raises rather basic questions concerning management's rights and prerogatives which, as indicated earlier, is complicated in academic negotiations by faculty governance. Reduced to simplest terms management rights with respect to tenure are those matters which management has not negotiated away.

Management rights provisions in the contracts typically take this line:

> "The Legislature and the Trustees, separately and collectively hereby and reserve unto themselves all powers, authority, duties and responsibilities and the adoption of such rules, regulations and policies as they deem necessary in the management, direction and administration of all operations and activities of the College shall be limited only by the specific and express terms of this agreement." (Genesee Community College, New York)

or:

> "Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the State are retained by it." (State University of New York)

or:

> "Oakland has the legal responsibility and, subject to the terms of this agreement, the right to manage its operations, including but not limited to the right to (a) hire, assign, promote, demote, schedule, discipline and discharge faculty members; (b) determine and schedule the academic year; (c) locate or relocate its physical facilities and equipment; (d) control all of its property." (Oakland University)

How management rights provisions could or would encroach upon traditional faculty practice in regard to tenure is pure speculation at this point. Contract administration experience is not extensive enough nor adequately documented to permit reliable conclusions. Assertion of management rights is likely to surface during contract administration in the event of a program cut where the contract makes no provision for faculty retrenchment or where management policy declares a moratorium on new positions in combination with a high attrition rate and increased workload.

It is also too early to tell whether or not aggressive unionism will induce a polarized response from Boards of Trustees and state governments toward a "management's rights" psychology. I believe that sustained and militant pursuit of unionism by faculty will induce a more aggressive management initiative on the part of university officials. This will be abetted by both economic and other conditions outside the university as previously described in the section of this paper on the causes of unionism. For in practical effect, the thrust of faculty unionism is to circumscribe by a legally enforceable contract the legal authority of the board of trustees and the executive responsibility, wherever it might lie. Make no mistake, faculty unionism is a frontal attack upon the legal control and ultimate institutional responsibility vested in the lay board of trustees and the executive authority of governmental officials in the case of public institutions.

Thus at some institutions (not all institutions) existing governance schemes, collegial attitudes, and pre-bargaining faculty prerogatives as we have known the frequently undefined in a specific sense, simply will not survive the advent of militant unionism. This raises the chicken and egg argument that had there been "collegiality" and faculty participation in the first place, there would not have been militant faculty unionism. It has been the heavy exercise of managerial authority, especially by governmental officials in large public institutions, that has been a primary cause of faculty unionism. Nevertheless, confronted by self-conscious faculty unions seeking to secure "rights" signed, sealed, and delivered in a written contract, one response at some institutions is likely to be an escalated "management" reaction and a major redefinition of institutional authority *vis-a-vis* faculty. Assuming this were to happen, it is not clear how it would be manifested.

Managerial authority could be asserted in contract checks on faculty appointment, promotion, and rank ratios negotiated to protect ultimate board authority. Hardened managerial attitudes in negotiations could force faculty to trade off pre-bargaining rights by conceding them as management rights in exchange for salaries and aspects of job security. It could be manifest in institutional counter-proposals for experimentation in types of academic appointments such as five-year term appointments

or committees to review the merits of tenure in the context of the particular institution. It may increase pressure for greater institutional scrutiny and justification in the initial academic appointment process. There may be institutional efforts to place centralized control over personnel funds over which departments would otherwise exercise control, or new types of pay incentives based on productivity concepts to induce larger scale experimentation in teaching methodology. It could well resurrect, in a real way, the merit concept with more centralized control over merit funds. Management initiatives might encourage sporadic employment relationship by greater use of part-time faculty. Clearly, some of this would not necessarily be the result of a new-found management psychology because forces are already building in this direction. But unionism could accelerate the trend.

It is both too early and highly speculative to tell whether or not positions will harden and polarize. The importance of skill and sophistication in the art of compromise and uses of the bargaining process cannot be underestimated. Undue contentiousness and ill will are more often than not the result of those on both sides who are ill equipped to function responsably in a collective bargaining context. Much depends upon the faculty tradition and the pre-bargaining relationships at a particular institution. In many cases, faculty representatives and institutional officials will be reluctant because of strong institutional traditions, if not their trained incapacities to do otherwise, to shrug off collegial relationships characteristic of yesterday for the confrontation styles of unionism seen in some schoolteacher experiences. In the main this is desirable.

Tenure Matters Subject to Grievance

There is a difference between the traditional academic grievance system and a collective bargaining one which is typically contained in the negotiated academic contracts so far. Academic grievance systems usually entail review by joint faculty-administrative committees which make recommendation to the Dean, President or Trustees, whose decision is final. The emphasis is informal and upon behind the scenes consensus. The purpose is to adjust individual problems and not collective or institutional matters and rarely involves the use of outside third parties. Collective bargaining grievance is quite different. Its purpose is to provide a method for challenging institutional actions with respect to those matters which the parties have defined in the collective bargaining agreement as "grievable." It is typically designed in three or four stages which become progressively formal and adversarial at the latter stages culminating with a final administrative decision which when challenged, is often subject to review and binding arbitration by an outside third party arbitrator(s). It involves not only individual grievances but also institutional or collective grievances. Thus the

challenged interpretation placed upon a grievable contract provision relating to tenure can effect basic faculty-institutional relationships or entail substantial costs.

There are two keys in assessing the potential impact of a grievance system: (1) the definition or scope of what is grievable, (2) whether or not there is binding arbitration. Thus if grievance is limited only to contract provisions there will probably be, depending upon what is in the contract, less scope of challenge than if grievance is defined to include policies of the governing board or other written administrative policies in addition to the contract. By the same token the definition or the scope of grievance is less critical where there is no binding arbitration and final decision is reserved in the governing board. For example, some contracts seek to subject to the contract grievance system only tenure matters negotiated in the contract (Central Michigan), the application of written board policies relating to tenure (SUNY), and even written administrative policy (St. John's).

There is a definite trend toward binding arbitration of grievances. There is, however, also a consistent effort to keep the academic merits of a tenure decision out of the grievance machinery. One approach provides for review of procedural violations in evaluations but keeps the review before an in-house committee with no provision for arbitration (Central Michigan). While the New Jersey State College Contract contains detailed tenure promotion procedures, personnel file procedures, and promotional criteria, it expressly excludes from the grievance procedure "decisions involving the non-reappointment of probationary or non-tenure personnel."

Another approach often used where the contract has binding grievance arbitration is to limit the arbitrator's scope of review in tenure grievances to whether or not there were procedural violations in the evaluative process versus the academic merits of the decision itself. (CUNY, SUNY, St. John's are examples.) The St. John's and Long Island University (Brooklyn) agreements require written reasons for non-renewal of term contracts.

Resistance to hashing out the academic merits of a tenure decision through the adversary grievance machinery by limiting the arbitrator's scope of review may prove impractical. Tenure matters, such as evaluative criteria and procedures can become so detailed and cumbersome that implementation may almost guarantee their violation especially where evaluative authority is highly diffused to departments and schools within the institution. The problem is inflamed by the practical difficulty in distinguishing between procedural violation and academic merits.

The difficulty in hewing the line between a review of evaluative procedures and the academic merits is compounded where the scope of grievance review includes findings as to whether in a tenure decision there was:

> "errors of fact, gross prejudice, capricious action, or factors violative of academic freedom influenced the decision." (Central Michigan)

or:

> "An arbitrary or discriminatory application of or a failure to act pursuant to..." (contract or board provisions) (St. John's)

I speculate that the bird-dogging instincts of a new union trying to establish itself, availability of contract grievance machinery, access to union attorneys and staff, will initially increase the volume on campus of challenges to non-renewals and promotional decisions. Recourse to a collectively bargained grievance system will be more attractive than court action where it offers greater procedural safeguards than required by the Roth and Sindermann decisions. Initially, I predict an inordinate amount of time and energy will be spent on grievances over tenure and promotional matters. In some instances, it may be intimidating with a tendency to discourage non-renewals of term contracts in borderline cases because of the potential problems and arguments involved.

On the other hand, grievance machinery offers the long term potential to resolve abuses of the faculty evaluative process once academics become familiarized with the grievance machinery; many disagreements will be settled at the informal stages. Properly administered, it will highlight weaknesses in the evaluative process which can be corrected and will encourage thorough justification of appointment and evaluation decisions. All of this may be an improvement over academic grievance systems which have not been effective in my experience. They have been characterized by long delays, imprecise definition of grievance, inexperienced and untrained hearing bodies. Some institutions simply have no grievance machinery at all! Too frequently academic administrators, atrophied by faculty complaints, look upon academic grievance as a sandbox for faculty play. Or it becomes a means for, politically speaking, "reading the situation" but not as a device for adjudicating a dispute and putting the matter to rest.

Collective bargaining grievance is usually designed to encompass the following features: a precisely defined procedure, objectivity in selection of hearing bodies, credibility because bilaterally negotiated, timely disposition of cases, professionally skilled persons to administer it because of its impact on policy and decision-making, and continuity in interpretation of policies.

In sum, it is clear that matters pertaining to tenure and promotion will become increasingly subjected to contract grievance machinery. It will encourage initially challenges to non-renewal and promotional matters. These challenges will entail formal hearings, written decisions, interpretations of promotional criteria, and precedent-setting interpretations of key contract or board policy provisions relating to tenure. It has however, the long-term potential of reducing disputes and promoting stability.

Conclusion

After reading this paper there will be those who will shake their heads in dismay and react in accordance with the admonition: "Do not adjust your mind. There is a fault in reality." The potential in officialdom for self-deception when it comes to faculty unionism is nearly limitless.

We like to think that institutions are shaped according to the best vision of the best men in them, able and vigorous men sharing a vision of how they might shape their future and creating institutions to that end. But as John Gardner once said, sometimes institutions are simply the sum of the historical accidents that have happened to them. "Like the sand dunes in the desert, they are shaped by influences but not by purposes... like our sprawling and ugly metropolitan centers... the unintended consequences of millions of fragmented purposes." To be sure, the impact of the collective bargaining process upon tenure will be influenced and shaped by the prevailing problems and thinking on tenure; unionism is more often than not a response and not a cause. But tenure policy on unionized campuses, indeed faculty relations generally, will be largely influenced by men of goodwill exercising restraint. Above all, it will require a clear understanding of the bargaining process and its adaptability to the unique characteristics of academic institutions. An open minded approach and an understanding of the process on the part of both sides is critical. In the last analysis, these factors will be decisive in avoiding needless damage to the University tradition.

Martin Mayer, in his book on the teachers strike in New York indicated that the ill-will and damage to the city school system which it caused could have been avoided. He said:

> "Great wealth, academic position and political leadership carry responsibilities which were not met. At no point in the history that will be described on the succeeding pages did these forces demonstrate any understanding of what was

> happening in terms other than their own preconceptions, and at no point did they exert the authority, leadership or even influence which their status and social role obliged them to exert."

I hope that a similar indictment will not be made against those charged with the stewardship of higher education.

FOOTNOTES

1. These figures are from an unpublished survey conducted as part of a project of the Carnegie Commission on Higher Education. Part of the survey was reported in the Chronicle of Higher Education (April 6, 1970).

2. American Association for Higher Education, Faculty Participation in Academic Governance, 1967, p. 27 (Hereinafter AAHE).

3. Robert Nisbet, The Degradation of the Academic Dogma, p. 17, Basic Books, Inc., New York, London, 1971 (hereinafter Nisbet).

4. See Eric Hoffer, The True Believer, 1966, Harper & Row; see also Harlan Cleveland's address to the National Association of College and University Attorneys, Hawaii, June 1972: Muscle-Bound Academy in which he said changes in a university seem frequently to require: "more written procedures, more Administrative bureaucracy, and more formal relationships among multiple interest groups that make up the university."

5. See A. Christenson: Collective Bargaining in a University: The University of Wisconsin and the Teaching Assistants Association, p. 219, Wisconsin Law Review, Vol. 1971, No. 1.

6. Cite NLRB

7. "Teaching Loads Draw Criticism of State Officials," The Chronicle, Vol. VI, No. 29, April 24, 1972. See also generally Cox Commission Report on the Crisis at Columbia, pp. 35, 33, 32, 23, 31. See also Scranton Report conclusion sections, Nisbet, pp. 71-111.

8. U.S. News and World Report, June 26, 1972, Col. 1, p. 77, which cites the Carnegie Report.

9. See AAUP Bulletin, p. 46, Vol. 58, No. 1, Spring Issue 1972.

10. On the other hand, Fordham University was one of the first universities to launch a no-bargaining campaign.

11. Byse & Joughin, Tenure in American Higher Education, Chapter II, p. 9.

12. See State University of New York Trustee Policies 1971, Article XII, Title B, Sec. 2, p. 19.

13. See the elaborate review procedure endorsed by the AAUP in its "Statement on Procedural Standards in the Renewal or Non-Renewal of Faculty Appointments" in Summer 1971 AAUP Bulletin.

14. Lucas v. Chapman, 430 F2d 945 (5th Cir. 1970); Greene v. Howard University, 412 F2d 1128 (U.S. App. D.C. 1969); But see Jones v. Hopper, 412 F2d 1323 (10th Cir. 1969); Bolmar v. Keyes, 162 F2d 136 (2nd Cir. 1947).

15. Roth v. Board of Regents, 40 LW 4079, Case No. 71-162, U.S., June 29, 1972; Case No. 18490, 446 F2d 806, July 1971 (7th Cir.); Sindermann v. Perry, 40 LW 5087, Case No. 70-36, U.S., June 29, 1972, 430 F2d 939 (5th Cir. 1970).

In Roth the Supreme Court overruled lower courts which had ordered university officials to provide the professor with written reasons for the non-renewal and a hearing. The Supreme Court held that the Fourteenth Amendment does not require opportunity for a hearing, or the need for written reasons, prior to the non-renewal of a non-tenured state college professor's contract, unless the professor can show that the non-renewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Applying the Roth rule, the court held in Sindermann that where the professor can show that he had a property interest in continued employment either secured by state law or "existing rules or understandings" he has in turn a right guaranteed by the Fourteenth Amendment "to some form" of prior administrative or academic hearing on the cause for non-renewal of his contract. Accordingly, the court directed the lower court to give the professor an opportunity there to prove his allegation that while he did not have tenure in accordance with a "formal" institutional policy, he did have *de facto* tenure by virtue of the custom and practice at that particular institution, thus entitling him to reasons and a hearing for non-renewal.

In Sindermann, the court, following established precedent, held that even where a professor has no tenure or a right to continued employment, he is nevertheless entitled to a day in court on the issue of whether or not his non-renewal was merely because he exercised his constitutionally protected First Amendment right of free speech in criticizing the college administration. Thus the court applied the well established rule that even though a government (i.e., State University or State College) may deny employment to a state employee for any number of reasons, absent tenure or civil service rights, nevertheless there are some reasons upon which a government (i.e., State college) may not act. It may not deny even the most tenuous employment status to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech.

The Roth and Sindermann decisions hold that as a general rule a public college or university is not required to give reasons or a hearing for non-renewal of a professor's term contract. These rulings effectively weigh in favor of institutional and peer group discretion in matters concerning tenure evaluation. Individual recourse is primarily to the courts where he must prove a *de facto* right to tenure or a violation of his constitutionally protected rights.

Clearly the Supreme Court has been reluctant to resolve the problem and has in effect turned it back to the academic community. The problem is still with us.

16. Reduced to its simplest terms exclusivity or exclusive representation is provided for in the NLRA and most state labor laws and provides that once an employee organization wins the election, it has the exclusive right to negotiate terms and conditions of employemnt on behalf of those in the employee unit. For impact of doctrine upon a university, see McHugh, p. 82, Finkin, p. 134 in Wisconsin Law Review, Vol. 1971, No. 1. The distinction between management and the worker is well summarized by Eric Hoffer in his The Ordeal of Change:

"The Allegiance of the manager is to the task and the results. However noble his motives, he cannot help viewing the workers as a means to an end... and it matters not whether he does it for the sake of profit, for a holy cause, or for the sheer principle of efficiency... when it can plan and operate without having to worry about what the worker will say.... Any doctrine which preaches the oneness of management and labor -- whether it stresses their unity in a party, class, race, nation or even religion -- can be used to turn the worker into a compliant instrument in the hands of management.... Our sole protection lies in keeping the division between management and labor obvious and matter of fact.... Thus it seems that the worker's independence is as good an index as any for measuring the freedom of a society."

17. American Association for Higher Education, Faculty Participation in Academic Governance, p. 1 (1967).

18. The New York Public Employment Relations Board in addressing itself to the question of whether or not the State University of New York's system-wide faculty senate was an employee organization under New York's Taylor Law recognized the scope of negotiation problem in faculty-university collective negotiations. It said: "The record makes it clear that the Senate, in its role as faculty governor, has represented the faculty position with regard to economic goals as well as a number of matters of educational concern such as admissions policies, faculty hiring, promotion and tenure procedures, curriculum, and class size (emphasis mine). It is equally clear

that many of these matters would constitute, to some degree, negotiable terms and conditions of faculty employment" (emphasis mine). See In the Matter of State of New York (State University of New York) 2 PERB 4183, p. 4 (August 12, 1969).

Pennsylvania's Public Employment Relations Board has rendered a decision which limits scope of negotiation somewhat in school teacher bargaining. See College Park Teachers Association. The case is on appeal. (Pennsylvania Labor Relations Board, 1617 Labor and Industry Building, Harrisburg, Pa. 17120).

The Hawaiian Public Employment Relations law places limitations on scope of negotiation. Whether this would limit negotiations on tenure is questionable at best. Even in that state the likelihood is that at least some elements of a tenure system would be neotiable.

19. Supra; In the Matter of City School District of the City of New Rochelle, Case Nos. U-0249, U-0251, NY PERB held that the decision of the school superintendent involving budgetary cuts with concomitant job eliminations is not a mandatory subject of negotiations between the union and employer. However, the employer is obligated to negotiate with the Federation on the impact of such decisions on the terms and conditions of employment of the employees affected.

COLLECTIVE BARGAINING AND ITS IMPACT ON BOARD-PRESIDENT RELATIONSHIPS

Rose Channing, Stuart Steiner, Sandra Timmermann

The advent of collective bargaining on the educational scene is evolutionary rather than revolutionary. Literature on the roles of college trustees shows a gradual change in viewpoints over the last decade. For example, in 1966, the New York State Regents Committee on Educational Leadership identified five major responsibilities of Boards as follows: (1) legally responsible for assuring that the college fulfills the responsibilities for which it is established, (2) understand and approve education offered, ascertain quality appropriate to its purposes, (3) carefully select, counsel with and support the college president, relying on him for educational leadership and assisting him in its exercise, (4) promote understanding and cooperation between society and the college, and (5) oversee the acquisition and investment of funds and the management of facilities for the implementation of the educational program.[1]

Six years later, Wilson wrote:

> Although there is manifest disagreement about whether trustees are really needed, and, if needed, about their duties and how they should be executed, clearly the leaders among them are deeply concerned with a wide range of critical problems in American higher education.

Wilson went on to cite six of the most common concerns of trustees according to a recent survey as: (1) finances, including optimum use of funds and facilities, and threatened loss of support as a result of public backlash, (2) governance, including communications, (3) faculty, teaching, and innovative educational programs, (4) student unrest, (5) definition of institutional goals and higher education's relations to society, (6) institutional leadership.[2]

Recent literature continues to give evidence of questioning the long accepted role of college trustees and makes references to changes as in an article by Richardson who states that, "The trustees must come to understand that the legal authority which has been delegated to them must be shared with students, faculty, and administration, rather than being delegated exclusively to the administration."[3] He also stated that trustees need to refrain from injecting their organizational biases, recognize they are not part of the day-to-day activities, be well informed, take corrective action as a result of evaluation, and serve as an appeals body when issues cannot be resolved."[4]

The role of the president, likewise, comes under scrutiny in the literature, and change in viewpoints is also apparent. Richardson, Blocker, and Bender state that, "The president is no longer the supreme arbiter or the power figure in institutional politics. He is a mediator who has a major responsibility, the reconciliation of opposing interests while at the same time preserving institutional goals and directions."[5]

These authors go on to say that job descriptions of presidents, showing such areas as budgeting, fund raising, building construction, and public relations, have limited usefulness for the practicing administrator. Bringing in the influence of collective bargaining, they advocate advising the president to remain strictly aloof from this process, delegating responsibility for administrative participation to a staff officer. It is felt that the president who can successfully implement the mediating role is in a strong position to reconcile opposing interests. He must be accessible to the various constituencies he serves on a more or less equal basis. He is providing leadership to an organization that involves shifting and complex patterns of human relationships.[6]

Dykes presented four trends in the administrative role of the president which he proposed were consonant with the emergent social and cultural characteristics of our time as follows: (1) the administrator will become stronger, more powerful, and more influential in both the administrative and leadership dimensions of his role, (2) administrative values and behavior will become increasingly democratic, (3) the administrator's role will become more political in character, and (4) the fostering and advocating of innovation will be an increasingly important function of the administrator.[7]

A study which reflects changing relationships, conducted by Scott, showed role status of administrators in collective bargaining situations, as seen by school superintendents. Out of 98 superintendents questioned, the following responses were obtained:

1. Less closely related to teachers and their work 17
2. Serve as mediator between teachers and board 24
3. Serve as negotiator for the board 34
4. Independent stance 24
5. Represent view of public 5
6. Indefinite - too early to define role 30
7. None of the above 11

This study went on to say that if the board assumes full responsibility for the conduct of negotiations and meets with representatives of teachers, it undermines the administrator's position and establishes him as the adversary of teachers.[8]

Another area of concern, referred to in several instances, is the effect of collective bargaining on the economic situation in colleges which directly involves board-president relations. For example, Boyd lists fiscal implications as one of the potential consequences of collective bargaining in colleges. He points to need for a growth in the bureaucracy and a rise in indirect costs.[9]

Bucklen stated that collective bargaining would require a disclosure of budgetary information freely to both sides. He cited such costs as direct personnel costs, indirect costs and maintenance of information systems. He suggested that the fiscal parameters of the college must be known and what the implications of negotiation proposals would be on the financial resources.[10]

From this brief sampling of literature on the changing roles of boards and presidents, operating in a collective bargaining situation a discernable trend can be seen away from the basic pyramid structure of relationships toward a participatory model. Out of the evolutionary process of emergence of the teaching faculty as a power center, the subordinate and superordinate relationships are being replaced with spheres of influence and defined responsibilities. From authority that is exercised downward in which the board is a legislative body, emerges a Board of Trustees representing more of a legitimating and arbitrating body to which appeals may be brought that cannot be solved in other ways.

Changing Relationships as Defined by Board Members

To enable the study team to explore the topic more completely, the team decided to interview trustees of three community colleges. The colleges selected were at least five years old and had operated for at least two years with some form of collective bargaining. Two trustees from each of these schools were interviewed. The interview survey consisted of ten questions which were designed to reveal whether or not the relationship between board and president, and board members to each other, had changed, and whether collective bargaining had resulted in the formulation of new roles for them.

1. Has collective bargaining changed the principal function of the college president?

The board members felt that collective bargaining was forcing the

president to change his priorities and reorganize his time away from academic and educational matters. With one exception, they viewed the management of collective bargaining as "an additional burden" to the president and mentioned the great amount of time involved in grievance procedures which previously could be devoted to other issues.

All of the board members commented that collective bargaining had limited rather than expanded the president's authority. They pointed to matters that now require shared authority which, before the advent of collective bargaining on campus, had been the sole responsibility and decision of the president.

As an example, one of the board members commented that the president's authority in academic matters is threatened by the unions when it comes to issues such as faculty workload and numbers of students per class. Because the union's chief concern is the working conditions and welfare of its members, the quality of education becomes a secondary consideration. The president, he said, ought to be able to fire faculty members if they are not performing their job properly; without this capability, he has lost his control.

As a result of collective bargaining, it appears that the president's working time is consumed with a growing amount of "non-educational" matters related to items in the contract. According to a few of the board members, during the actual negotiation process, he must devote a good portion of his day to planning and advising; and throughout the year, his personal calendar reflects the large portions of time he must allot to take care of union issues that occur on a regular basis, often given priority over other items.

Consequently, the process of change has been slowed down. The president constantly must refer to the negotiated contract before he can plan any innovative projects. He may, for instance, hope to undertake a new program; but before he can begin its implementation, he must first check the contract to determine scheduling, availability of instructors and the like.

In some cases, collective bargaining apparently has brought on a better understanding between the faculty and the president. Prior to the introduction of negotiations on campus, the president was in the sometimes awkward position of interpreting faculty views to the board, or vice versa. At times he was caught in the middle of a controversial issue. Now, as one board member pointed out, the president knows exactly where he stands with the faculty -- and the faculty knows where it stands with him. Consequently, they can meet each other with a clear understanding of terms at the outset.

2. Have the major pressures on the president changed since the advent of collective bargaining on your campus?

All of the board members questioned felt that collective bargaining had brought greater pressures on the president, and that, generally, the bargaining process was making it more difficult for him to get things done. Collective bargaining was viewed as restricting the progress of the president, slowing him down and impeding decision-making. The president, according to the board members, must constantly be aware of the actions and activities of both his office and the board to make certain that they are covered under the contract. Decision-making must be delayed until the contract is checked. He also must move at a slower, more deliberate pace -- and can become frustrated because changes are slow in implementation.

According to the board members, there are a number of additional management pressures that have come about as a direct result of collective bargaining. For example, the president in all likelihood has added new staff to take care of the negotiations and he must supervise them. He also must be fully aware of all contracts and agreements. In addition, he must spend time in "educating" the members of the management team, making certain that department chairmen and other administrators can respond properly to grievance procedures and are the type of persons who can live with the kind of climate that collective bargaining has generated.

As an additional pressure, he is faced with personal emotions of individuals on his staff or on the faculty which must be confronted across the bargaining table rather than in the privacy of an office. Often, issues are blown out of proportion and matters once settled informally must now be brought up before the grievance committee. One board member commented that, because of the nature of the collective bargaining process, the president also has to cope with group emotional problems. In his opinion, these are even more difficult to handle than individual emotions and feelings.

The president has to be not only a "diplomat" but also a "watchdog," and some of the watchdogging creates tense situations. As an example, one of the board members mentioned the president's responsibility to supervise faculty sickleave and make certain that it is not abused.

The negotiation period itself, which can last as long as nine or ten months, places great pressure on the president. During this period, as a few of the members pointed out, the pressure continues to build until the contract is signed. The threat of a strike, for example, may be a real concern on some campuses. In all cases, however, the president must be sensitive to what he can give away without jeopardizing the administration's position; he must determine how much he can compromise without "giving away the jewels."

3. Has the Board more of a tendency to take exception with the president's recommendations now as compared to the period prior to collective bargaining?

None of the board members reported a greater tendency to take exception with the president with the advent of collective bargaining. They may be more inclined to ask questions and to get involved in issues, but, in all cases, they continue to work through their president and support him as they did before collective bargaining was introduced on campus.

A few board members mentioned that they are perhaps more aware of the faculty's problems than they were before the advent of collective bargaining -- and that, in fact, faculty now try to get directly to them to discuss issues -- but their loyalties to the president and their procedures for conducting business had not changed.

In many ways, in fact, it appeared that the board now relies more on the president than they did prior to the introduction of negotiations on campus. As an example, one board member commented that he had considered the faculty more "levelheaded" before the advent of collective bargaining. Now, after listening to "many unreasonable demands," he has more of a tendency to accept the president's opinion and take his recommendation. Another board member commented on improved relationship with the president as a result of the collective bargaining process; he and the president, he said, had walked hand in hand in adjusting to the frustrations of the new procedures and he now knows that the president's recommendations are based on sound knowledge of contract details.

4. As a result of collective bargaining, has the president's influence with the board been increased or decreased?

The influence of the president has neither increased nor decreased, according to the board members. They are more aware of the faculty's needs as a result of collective bargaining -- and, in fact, may respond to more outside communications than before -- but they still view the president as their representative and continue to support him.

It was pointed out, however, that in many ways, collective bargaining forces the board members to focus on issues and sharpen their views. When things get tough, the board members tend to view the faculty as the opposition. A polarization occurs, making the faculty an adversary to the board and thus strengthening the president's influence with board members since they view him as their "ally" in conflicts of this kind.

The collective bargaining process -- coupled with the increase of information -- has resulted in the board members gaining more insight into

the difficulty of the president's job: thus, they are less likely to take him or his responsibilities for granted. It was interesting to note that the majority of trustees indicated that while their understanding of the president's role has increased in a positive sense, the "status" of the faculty has diminished in the eyes of the board. They may be more aware of faculty problems, but they certainly are not as likely to be influenced by them as they were in the past.

5. Has the advent of collective bargaining changed your opinion of the desired characteristics you would look for if you were seeking a new president?

The board members cited some specific characteristics they would look for if they had to select a new president for their institution. According to all but one, the most important qualification was experience with collective bargaining or, at the very least, a willingness to be involved with it. They reported that they would seek out a candidate who was responsive to the bargaining process and to the operation of the faculty within the union, and who showed a balanced view and a full understanding of the problems. At the same time, they would eliminate any candidate who felt that collective bargaining should be left to other administrative personnel and who did not view it as one of his critical responsibilities, although none of those interviewed felt that the president should be involved in the actual "across the table" negotiations.

Since collective bargaining seems to require excellent interpersonal relations with all involved in it, some of the board members mentioned that intangible personality trait so difficult to define and describe -- charisma -- as a vital presidential characteristic. One board member characterized the ideal president as "a realist with an ability to communicate and a sense of humor."

It is interesting to note, however, that one board member felt that experience with -- or even interest in -- collective bargaining was not of great importance in considering a potential presidential candidate. He felt that the president should remain detached from the process, assigning the sole responsibility to someone else on staff. In seeking a president, he would look instead for a scholar with some administrative experience who was able to get along with the faculty.

6. Has your role as a board member changed since the start of collective bargaining on your campus?

When asked if their role had changed, the board members commented that their outward functions had not -- but that there was, indeed, a subtle change. They stated that collective bargaining had forced them to ask more questions than before and had made them more aware of educational

matters such as class size, faculty load and the like. As a result, they said, they were more involved and more concerned with those issues that were formally considered as part of the president's domain. As one board member commented, handling a union crisis is no different than handling any other kind of crisis, but the board seems more likely to enter in when the union is an active participant.

With this added awareness, however, has come more involvement in administrative detail than they wish -- by necessity, not by choice. A few of the board members pointed to the fact that their involvement basically has little to do with the educational process. They may be brought in to solve more problems, but they are generally administrative ones -- the "nuts and bolts" of operation.

If a board works through committees, the committee assigned to contracts and negotiations must devote great amounts of time to carrying out its responsibility. As an example, a board member who serves on his college's personnel committee -- which met only two or three times a year prior to the time collective bargaining was introduced -- is finding that the committee must meet quite frequently now. He cited its responsibility as liaison for the board -- and the consequent problems it is faced with in setting guidelines and in determining which of the demands placed before it are important and which are unimportant.

The changed role of the board in relation with the community and the faculty was mentioned by one of the board members. He felt that, more than ever before, the community has a tendency to misunderstand the college due to the settlements of the contract. Therefore, the board must assume a greater role in interpreting the college to the townspeople. He also commented that the board's role with the faculty had become strained, primarily as a result of collective bargaining. The board, which at one time had championed the majority of faculty causes, now looks for points of dispute and actively seeks to take exception to faculty requests.

All in all, most of the board members felt that collective bargaining had added a new dimension to their trusteeship function, for in essence, they now had to assume ultimate responsibility for another policy matter -- negotiations and contracts.

7. Has collective bargaining generated a different flow of information to the board?

The board members interviewed did not perceive that the information flow had changed, and all mentioned that they still relied on the president as their source of information. However, for the majority, it appeared that the "informal channels" had increased and broadened. They

reported that they were indeed receiving more information from a variety of sources (including both faculty and students) than they had before collective bargaining began on campus. Consequently, they felt they were better informed than ever.

For example, many communications and grievances are circulated directly to the board now. In some cases, reports on collective bargaining positions and actions are routinely furnished to all of the members. In addition, much information comes to the board from official faculty and student groups who attend open board meetings. At these meetings, the board listens to all arguments on the issue, asks questions and then decides the credibility of the information. Despite these new opportunities for greater participation, however, a few of the board members noted that they still do not deal with the matters directly and so they look to the president to advise them.

Although it was generally agreed that more information was generated to them than during the period prior to negotiations, two board members commented that the information they received was only of the administrative variety and did not touch major academic issues. Another commented that, in some ways, he relied even more heavily on the president for information since the negotiation regulations discouraged personal contact with the faculty.

8. What effect, if any, has collective bargaining had on the interpersonal relationships of board members?

In regard to interpersonal relations with their fellow board members, the majority of board members interviewed indicated that collective bargaining had no specific effect, and that there was no perceptible change in relations among themselves. Some mentioned that, if anything, they now understand each other better.

It is interesting to note, however, that for two board members serving on the same board, interpersonal relations did change as a result of collective bargaining. The two board members reported that friction had resulted against one board member as a result of contract disagreements. The negotiations, they both commented, had given him the "handle" he needed, and he used it to constantly support his point of view (in sympathy with faculty demands) against the remainder of the board. His opposing views, and the manner in which he presented them, have apparently caused some animosity and hard feelings among the members for the first time in the college's history.

9. What do you perceive as the positive outcomes of collective bargaining, from the board's point of view and from the president's point of view?

Generally, the board members did not cite many positive aspects of collective bargaining for themselves or for the president. They did point out, however, that the increased flow of information from a variety of sources had resulted in keeping them better informed than they had been before collective bargaining was introduced. With the greater knowledge they acquired, they reported that they were able to make better decisions.

A few mentioned that since there are now definite channels with which to operate, everyone involved in the collective bargaining process knows exactly what is expected of themselves and each other. Consequently, those who formerly complained to the board, prior to the advent of collective bargaining, are more satisfied with the final decisions. The grievers are now assured that decisions have not been made behind closed doors and, as a result, are less apt to consider themselves persecuted -- and are more apt to consider themselves in a secure position.

As for the president, some board members felt that collective bargaining procedures had uncovered problems that might not have surfaced and therefore helped him to resolve situations before they became major crisis issues. One board member felt that in some ways, collective bargaining had relieved him of the problems of "playing nursemaid" to the faculty. Prior to collective bargaining, he was forced to spend time meeting with individuals on a one-to-one basis, often about insignificant issues. Now he only has to concern himself with the official faculty representative -- saving him time and anxiety.

In fact, the president now has a more realistic relationship with the faculty. According to a few of those interviewed, he knows his exact limitations, for they are clearly defined in the contract. Consequently, he is no longer under pressure to make personal exceptions, and he is probably more apt to be trusted than he was before negotiations were introduced.

10. What do you perceive as the most negative outcomes of collective bargaining, from the board's point of view, and the president's point of view?

The negative aspects of collective bargaining were more clearly verbalized than the positive ones. A majority of the board members stated that they were spending too much unproductive time in administrative detail and insignificant problems as a result of negotiation procedures. They perceived collective bargaining as limiting their role, noting that the unions were attempting to move into governance. The process of negotiating, they commented, has had the effect of limiting the freedom of action of the board -- and might result in attracting a new type of board

member who is more willing to tolerate details in deference to policy-making.

One trustee mentioned that collective bargaining was responsible for a deterioration in faculty-board relationships. The faculty demands are often considered "out of line" by the members of the board and, as a result, hard feelings and animosities build up and are difficult to repair.

The quality of the faculty is also affected by the bargaining process. By nature, union contracts are set up to defend the inadequate and weakest teachers. At the same time, the good teachers suffer because the board can no longer consider them as individuals. Instead, the trustees are forced to judge them according to the standards of the contract and make the appropriate generalizations.

According to the board members interviewed, the negative aspects extend to the president too. They pointed once again to the pressures on the president as a result of the bargaining process, noting particularly the strains he faces in dealing with the faculty. The president, they commented, is more harassed than ever, for collective bargaining is infringing on areas that were previously considered his sole domain. For example, decisions involving the use of his own time -- or decisions of strictly professional matters -- are now subject to outside input. Compulsory arbitration allows third parties who are not even formally connected with the college to make decisions that will have significant effect on both financial and philosophical aspects of the college operation. They might influence, for example, the hours and days a college can operate and the type of calendar to be set up. In essence, the president has lost the power of unilateral decision making in professional matters.

Like the board, the president must spend increasing amounts of time on unproductive matters. As a result of the increased "red tape" of contract negotiations and the time involved in negotiations, the president finds that he must give in on major policy issues purely for expediency's sake.

In the extreme, board members stated that collective bargaining had limited the president's ability to do a superior job and had robbed him of flexibility. A president no longer has the incentive to attempt an imaginative program. Although he may have many excellent ideas, he now realizes that he must always check the contract before he can even hope to begin to implement them. In many ways, the president feels that he has lost control and responsibility. Since he is unable to do the things he wants to do, he does not believe that he has made significant impact on the college's educational program, and he is apt to stop trying.

Summary and Conclusion

In summation, the study team felt that the changing relationships between two year college board members and presidents, as reported by the board members interviewed, came about partly as a result of faculty unionization and the resultant collective bargaining process that took place.

The team found that collective bargaining seemed to result in solidifying the board-president relationship, despite the somewhat negative feelings expressed about its overall effect on the functions and roles of the president and the board members themselves. As the trustees learned more about the variety of tasks the president was faced with, they grew to appreciate more fully the depth and difficulty of his job responsibilities. It appeared that faculty "militancy" on some demands polarized board-faculty relations, giving board members the feeling that the president was their "ally" and the faculty the "opposition."

Generally, the board members said that as a result of collective bargaining they were receiving more information, both formally and informally, about many aspects of the college operation that heretofore were left strictly to the president to handle.

Despite the increased flow of information since the advent of negotiations, however, the board continues to rely heavily on the president, perhaps to an even greater degree than before. Although they may now ask more questions, they do not take any more exception to the president's recommendations than in the past.

The board members, with one exception, recognized that in the hiring of a potential president, they would look for someone who was knowledgeable and competent to handle all aspects of the collective bargaining process. Also, there was recognition and disappointment that the collective bargaining process has resulted in much expense and the use of much unproductive time by board members, the president, and the faculty.

Opinions were mixed regarding the effect of collective bargaining on the board members' relationship to each other. For the majority of the board members, however, it did not seem to have had a major impact except that they probably receive more information about a variety of items than in pre-negotiation days. Collective bargaining has resulted in the necessity for more personnel committee and total board meetings during active collective bargaining periods.

Board members saw little positiveness resulting from collective bargaining. They could cite a number of the negative results they perceived, including limitations placed on the board's opportunities to make

positive changes to meet student needs and to develop innovative programs; the generation of increased operating costs; and the use of much "unproductive time" by faculty, president and board members both during the period of the contract (grievances and arbitration cases) and during the negotiation period (planning and negotiating); and allowing third parties (arbitrators) to make overall college decisions. Some board members felt that the collective bargaining process tended to diminish the professional status of the faculty in the eyes of both the board and the public.

In conclusion, the information gathered in this brief study would tend to confirm the original hypothesis that collective bargaining was a factor in the changing relationship of the board to the president. Board members reported that the changes in the relationships -- in contrast to the individual roles they were now playing -- were of a positive nature in terms of the board developing more understanding about the president's overall responsibilities and relying on him even more than before in conflicts against the faculty, especially during the periods of collective bargaining or during a grievance procedure.

FOOTNOTES

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5. Richard C. Richardson, Jr., Clyde E. Blocker and Louis W. Bender. Governance for the Two Year College. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972, p. 128.

6. Ibid., pp. 129-131.

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AN EXAMINATION AND ANALYSIS OF STATE PUBLIC EMPLOYMENT STATUTES WITH RECOMMENDATIONS FOR STATUTORY TREATMENT OF INSTITUTIONS OF HIGHER EDUCATION

E. Gordon Gee

One of the most important questions confronting American public institutions of higher learning in the 1970's is how to effectively cope with collective negotiations on campus without erosion of many of the traditions on which higher education is built. The question of whether there will be, or should be, collective negotiations in education is moot. There are presently twenty-eight public employment statutes in eighteen states which have created bargaining legislation covering all public employees, including those in higher education, within these states.[1] Not only have such statutes mandated collective bargaining in the public sector, but they now exert pressure on those states who do not follow suit by either *de facto* or legislatively allowing public employee negotiations. Even with this statutory encouragement, higher education has remained one of the last outposts against unionization but, new evidence indicates, resistance is quickly crumbling.

The National Labor Relations Act (NLRA), which controls most labor policies in the private sector, specifically exempts from the term "employer" any state or political subdivision thereof.[2] Because of the exemption from the NLRA, there are three methods through which public employees are allowed to bargain with their employers: (1) state attorney general rulings or favorable judicial decisions; (2) voluntary, extralegal arrangements between employer and employees; and, (3) express statutory authorization. By far the most important of these three methods is that of express statutory authorization because the rights and duties of all parties at the bargaining table are affirmatively established. Statutes have the advantage of making a state's public policy toward negotiations by its employees absolutely clear. But, recent events also evidence the fact that statutory guidelines for collective negotiations in the public sector have successfully created much confusion among friend and foe, alike.

The major problem is that many of these statutes do not work. Teachers continue to strike, although almost all state statutes outlaw strikes in the public sector. Furthermore, teachers continue to ignore many of the other statutory requirements with apparently little concern for legal reprisals. This lack of confidence in present statutory enactments by teachers has resulted in part because public employment statutes appear to borrow too extensively from private sector enactments. They fail to sufficiently consider the differences existing between the

public and private sector and between various employees within the public sphere. Public employment statutes affecting professional educators also often draw arbitrary lines between "employer" and "employee" and encourage too much reliance by labor tribunals on precedents which may be inapplicable to problems in education. This ignorance of the actual employment conditions in higher education by state legislatures can only serve to encourage continued conflict among parties at the bargaining table.

Because statutory authority is the single most important element in the total negotiations picture in higher education, much more attention needs to be given to the formulation of public employment statutes. Lawmakers presently lack comprehensive guidelines on which to base their policy decisions because little has been written which would furnish a frame of reference for the consideration of legislative and administrative measures. This study is one of the first attempts to view the problems of collective bargaining in the public sector from the perspective of its impact on higher education. Up to the present time a few writers have studied various issues, such as arbitration and contractual problems, facing the negotiations process on campus. This was necessary because little, if any, information other than that in specific problem areas was available. It has only been during the past year that sufficient data has been published and research undertaken so that some of the more basic structural problems caused by collective bargaining in higher education can be examined. It had been assumed by many writers that the bargaining process in higher education was sufficiently similar to other employment areas in the public and private sectors that new and innovative approaches were unnecessary. The almost unparalleled confusion found among those engaged in labor negotiations in higher education attests to the falsity of that assumption.[3]

This study examines the distinctions between the public and private sectors, and between various employee groups in the public sector. The adverse effects of the extensive borrowing of statutory formulae and precedents from the private and public sectors on collective bargaining in higher education are identified. The unique nature of higher education as a labor enterprise with its concomitant problems are then explored in order to provide sufficient information from which recommendations creating uniform, clear and equitable statutory structures can be drawn.

The purpose of this study is to analyze the existing status of public employment relations statutes in order to formulate recommendations which will be useful to educators, legislators, and others involved in the legislative process to develop and improve these statutes as they affect higher education institutions.

The concept of collective bargaining was developed as a method to resolve conflicts between employer and employee in the private sector. Due to legislative and judicial recognition it has become one of America's most unique, and most powerful institutions. Only recently, though, has collective bargaining been adopted by some state legislatures as a means of conflict resolution between public employer and employee.

The Statutory and Legal Framework of Collective Bargaining in the Private Sector

Bargaining in the private sector is orchestrated, in the main by the National Labor Relations Act (NLRA), and its progeny, the Taft-Hartley Act and the Landrum-Griffin Act.[4] In general, the NLRA applies to any employers producing or receiving goods, directly or indirectly, which are in the flow of interstate commerce.[5] The impact on interstate commerce need only be *de minimus*, which has the effect of sweeping almost every private employer in the country under the Act. Therefore, Congress has created a comprehensive statute dealing with labor-management relations in the fifty states. The Act does not apply to any federal or state employees. It is an act dealing only with the private sector, which also includes eleemosynary and private educational isntitutions.

The NLRA is administered by an independent governmental agency, the National Labor Relations Board (NLRB). The NLRB does not initiate cases but only investigates and hears cases initiated by private parties, either through the filing of petitions for representation elections, or charges of unfair labor practices against employers or employees. The NLRB has the power to decide its own jurisdictional standards, but once decided, a case which falls within the jurisdictional standards must be heard by the Board, if properly petitioned. When a decision is reached by the Board, failure to comply by one of the parties allows the NLRB to go to a United States Court of Appeals for judicial enforcement of the order. The parties are also free to appeal or contest an order of the Board. At all times it should be noted, the proceedings are also subject to the Constitutional limitations of due process of law.

The Board decides all questions which arise under the Act including the appropriate bargaining units, whether any of the parties have participated in unfair labor practices, whether the parties have bargained in good faith, and is also empowered to conduct representation elections. The NLRB cannot force an agreement between parties but it can ensure that dilatory tactics and other coercive methods are not being used. Of further import is the fact that the NLRB has been given exclusive federal control over labor activities in the private sector, but it may cede to a state agency "jurisdiction over any cases in industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character)" as long as the state regulation is not

"inconsistent with the provisions" of the NLRA.[6] The National Labor Relations Board, therefore, will maintain jurisdiction over all labor disputes unless it specifically declines jurisdiction. This practice has successfully resulted in a uniform labor policy in the private sector.

In addition to the National Labor Relations Board interpreting federal labor legislation, the federal courts have the power to review Board decisions. The Board may seek enforcement procedures, or any aggrieved party may go into court to contest NLRB actions. Because the National Labor Relations Board is composed of parties who have obtained a great deal of expertise dealing with the vast array of labor problems constantly being litigated, courts are reluctant to overturn any Board rulings unless it is apparent that they clearly go against federal policy. Thus federal court review serves to assure every party of proper due process and a day in court while also providing an umbrella for a standardized labor policy throughout the country.

Today, collective bargaining in the private sector takes place in a well-ordered context. Time has exposed many of the initial flaws in the National Labor Relations Act allowing for either legislative or administrative corrections. A labor law applicable to almost every private employer in the country has enabled its administrative body, the National Labor Relations Board, to create national policies which promulgate continuity, uniformity, and relative labor-management harmony. This national labor policy has been overseen by the federal courts who have stepped in, usually, only when clarification of that policy seemed necessary. Uniform labor procedures have been further encouraged by state labor laws affecting those aspects of the private sector not covered by the NLRA because these laws generally adhere to the policies of the National Labor Relations Act and its administrative tribunal.

The Process of Collective Bargaining in the Public Sector

While the labor movement in the private sector has been protected and encouraged by federal policy since 1935, government, until recently, has failed to give the same support to its own employees. In the public sector, two traditional legal arguments have been used to prevent the spread of unionism: the concept of the sovereignty of the public employer, and its off-spring, the illegal delegation of powers doctrine.[7] These two constructs, both lawyer made, have presented the greatest barriers against unionism in the public sector.

Sovereignty, as developed in the United States, maintains that the government has sole authority over all governmental functions which can not be given to, taken by, or shared with any other party. Bargaining with or striking against government is therefore *per se* illegal because

such activity challenges the exclusive right of the sovereign to prescribe the conditions under which public servants will work. The government cannot, nor should it be, coerced into doing anything that it chooses not to do because government represents ultimate authority. The sovereignty argument, when accepted by the courts and legislatures, allows government officials to continue a policy of unilateral decision-making.

The illegal delegation of powers doctrine is only one step removed from the sovereignty concept. It states that the power of government is proscribed by statutory authority. Because the government is both possessor and guardian of this power it cannot abdicate its responsibility by delegating a part of its power to another party. Due to the fact that collective bargaining contemplates some sharing of authority, to bargain would, therefore, be an illegal act by the government. Government may not, according to this doctrine, share its powers with others.

Although these legal concepts were major factors in preventing the spread of unionism for many years in the public sector, they are generally rejected today by writers and the courts.[8] Private citizens may now sue the government in many areas of the law, which is a partial abdication of its sovereignty.[9] There is ample support for the right of public employees to bargain with their employers although, as of yet, the courts have not made it a duty to bargain without proper legislative authority.[10] Furthermore, many courts are now coming to the conclusion that collective bargaining is not an actual delegation of power because the parties, although they may be required to bargain in good faith, cannot be compelled to reach an agreement.[11] Finally, both legislatures and courts are voicing concern that an unrealistic labor philosophy has often led to illegal public employee activity, which in turn has undermined public confidence in present legal policies. Public morale and better government-employee relations, it is argued, can be improved only through the pursuit of enlightened policies, which means abandonment of outmoded constructs such as the sovereignty and illegal delegation doctrines.[12]

Not only are the courts abandoning their legal restrictions on public employee unionism, but a number of state governments are following the example of the federal government by creating legislative enactments allowing public employees to organize and negotiate with their employers.[13] While the emerging case law has gone a long way in opening the doors of collective negotiations by public employees, only statutory authorization will make a state's public policy perfectly clear. Legislation can take many public employees out of the limbo of an everchanging case law to the certainty which statutory guidelines furnish. Therefore, to provide the opportunity for a stable relationship between the state as employer, and its public employees, there is a growing recognition of the need for public employee legislation.[14]

Twenty-eight states as of June 1, 1972, have passed some form of legislation affecting public employees.[15] The statutes which have been enacted can be broadly classified as to type on a continuum from the most restrictive on public employee negotiations to the most permissive.

Most Restrictive — Most Permissive

"Meet and Confer" Statutes	Comprehensive Statutes with Independent Agencies	Comprehensive Statutes with Labor Board for Public and Private Employees	Comprehensive Statutes Allowing Limited Right to Strike

The "meet and confer" statutes usually allow public employees to approach the public employer and discuss matters of mutual concern.[16] Out of these discussions the public employer may or may not adopt new employment policies. The employer, under a "meet and confer" statute retains unilateral decision-making power. In effect, the "meet and confer" statute cuts against the trade-union model, which assumes bargaining among "equals" and opts for the right of public employees to suggest change subject to managerial discretion. Such a statute also usually rejects the concept of exclusive union representation while accepting multiple employee and proportional representation. The California public employment statutes are an example of "meet and confer" legislation.[17]

The comprehensive statute with an independent administrative agency generally is an attempt by the legislature to provide statutory guidelines for public employment negotiations which recognize some of the unique problems of the public sector. A comprehensive statute usually covers a majority of public employees at the state and local levels. An independent administrative agency is created to oversee the statute and resolve any conflicts which come under the statute. The agency is free to develop its own administrative rulings and deal with labor problems in the public sector in light of state or local needs without adherence to prior case or administrative rulings which often deal with the private sector. Such a statute usually allows for exclusive representation and creates a right of formal negotiations. Yet, the statute, by its structure, tries to divorce itself from private sector labor enactments by creating an agency to deal exclusively with the problems of public employees. The New York Public Employees' Fair Employment Act (Taylor Law) is an example of such a statute.[18]

The comprehensive public employee statute administered by an existing state labor agency which also administers the state private labor statutes, by its nature, tends to follow the trade-union model. This

type of statute is often similar to its private sector counterpart. Further, the fact that a single agency is used to contend with all of the labor problems in the state leaves the door open for the agency to adhere to rulings dealing with the private sector when confronted with similar problems under the public sector statute. In effect, a statute with a single administrative agency tends to merge labor policy for all sectors in that state. Wisconsin is an example of a state statute, modeled after private sector statutes, which has a single administrative board.[19]

The most permissive statutes for negotiations in the public sector yet promulgated are those that give a limited right to strike. It has been almost a universal norm among enactments, no matter how restrictive or permissive on issues of bargaining that strikes in the public sector are prohibited. The state legislatures and courts have generally felt that public employees owe too great a duty to the public, and maintain such vital services, that a right to strike must be *per se* illegal.[20] The right to strike is that ingredient which distinguishes between the confrontation of parties in close parity at the bargaining table, and the negotiations between parties of unequal ability to back-up their demands. Only three states, Vermont,[21] Hawaii,[22] and Pennsylvania,[23] have enacted statutes giving public employees a limited right to strike.

Although the majority of the present statutory treatments fall within the ambit of one of the four groups previously discussed, it should be noted that there are a number of variations among these legislative enactments.[24] A few state public employment statutes allow negotiations only with particular groups of employees such as teachers, policemen, or firemen. Other enactments cover municipal employees, while some statutes exclude municipal employees and allow negotiations solely with state employees. Still other statutes do not provide for any administrative machinery to implement the laws while some states allow a state agency, such as the state board of education, to oversee a statute instead of creating an independent agency or permitting an already existing labor agency to act as the administrative body. As can be seen, the final results of the pressures which have been exerted on state legislatures to provide public employment enactments have resulted in substantial variations in the legislation adopted as states struggle to find the right formula for labor peace in the public sector.

The procedures of collective negotiations in the public sector follow closely those in the private sector. The main distinction being that there is no uniformity in the public arena because each state has its own laws. A further distinguishing feature is that, at present, there is an attempt by state legislatures to limit the scope of bargaining and coercive activities available to the public sector unions. But, the influence of the private sector has successfully established a trend in the public sector toward the creation of public employment statutes which provide an umbrella under which the classic trade union procedures of confrontation and power politics can grow.

The Distinction Between the Public and Private Sector

In assaying the role of public employment relations statutes in the public sector, and especially higher education, it is necessary to fully explore the distinctions between the public and private sectors. All too often when legislators have promulgated public employment statutes in the various states, there has been extensive borrowing from private sector models without fully appreciating the distinctions which exist between the sectors. Wellington and Winter, after asking the question whether private sector collective bargaining should act as the model for collective bargaining in the public sector, concluded that it should not. They stated: "While there seems to be considerable justification for viewing the public employee as the functional equivalent of the private employee, we believe collective bargaining cannot be fully transplanted from the private sector to the public."[25] What, therefore, are the major distinctions between the two sectors?

Sovereignty

Although the sovereignty doctrine has been discussed previously, it is an underlying distinction between the public and private sectors. The concept that "the King can do no wrong," i.e., absolute governmental power, is dying. But the broad discretionary powers which government has traditionally held are still with us today. The public, through their duly elected officials, have given certain responsibilities to these officials which cannot easily be delegated or negotiated away without doing violence to the concept that a government official has an affirmative duty at all costs to pursue policies which are beneficial for the public commonweal.

In the private sector, the corporate manager has a responsibility toward the stockholders, but this responsibility is generally agreed to differ from that possessed by a public manager who is commissioned to be the guardian of the public's rights, including their health and safety. This special responsibility should, therefore, remain with the public and not be delegated to other parties through the negotiated contract. It is argued, in effect, that the public should retain all sovereign powers which control their destiny. Such arguments still hold sway as counter forces against collective bargaining in the public sector.

Economic Distinctions

One of the gravest problems in the public sector when the parties come to the bargaining table is the concept held by many public sector unions that the government is a "money tree."[26] The budgets of governments at all levels are large, and there is a seemingly unlimited amount of money available in the public treasury due to the taxing powers. Further, given the fact that governmental budgets are open to public scrutiny

makes it more difficult to effectively bargain with unions because they are fully aware of the amounts of money available, and will therefore rarely settle for any less. As noted by Arnold Zack, these budgets are often viewed by employees, not as the maximum of their demands, but as the base because of the feeling that government can always obtain more.

Accordingly, in the public sector there are not many of the traditional restraints found in the private sector. The government generally provides services such as public education, public transportation, and the protective necessities of police and firemen. It is therefore impossible for government to "lock-out" these employees, or to move to another area, or to go out of business -- all options which are open to the private sector employer. The public employee realizes these restraints on government when at the bargaining table and is able to enjoy leverage unavailable to his private employee counterpart.

The government is not in the business of making profits, rather it is in the business of providing services, especially services which would be difficult for the private sector to provide or which fall on the government as a natural duty to its citizens. As such, the restraints of the market place do not operate as they do in the private sector. Government is an industry that receives little competition from other industries so consumers have no choice, as they usually do in the private sector, from where they are going to obtain their goods -- it is either from the government or go without. Thus, product competition does not exert downward pressures on union demands for increased benefits. There is always the possibility that government may, too, price itself out of the market. Taxpayers can simply refuse to allow increases in the taxes they pay forcing unions to lower demands or else suffer the loss of some employees to unemployment. But, at present, the public generally is willing to suffer greater tax burdens rather than be subjected to a decrease in the quality of their services or to public sector strikes, although taxpayer revolts are becoming more prevalent.

Another factor acting as a restraint in the public sector is that taxpayers may flee one area for another when taxes become too burdensome. This is occurring in many large urban areas where the middle class is leaving the city for the suburbs, in part to escape increasingly heavy taxes. This depletion of taxable incomes in an area acts as a natural restraint on what government can offer its employees, especially in the larger municipalities.

Even though there are some market restraints on unions in the public sector, these restraints are not as powerful as the private sector "profit-motive." Public pressure for continuation of vital services coupled with the desires of public management to keep favorable political profiles, which can be hurt by labor problems, tend to effectively neutralize existing restraints on price hikes and union demand in the public sector.

Who is the Employer?

Another distinguishing feature between the public and private sector is that in the public sector it is often difficult to determine who holds final authority to bargain with a union.

Legislative Restraints

Another area which distinguishes the public from the private sector is the number of various legislative restrictions surrounding public employment as opposed to the relative uniformity of the statutory enactments controlling the private sector. There are not only many approaches toward public sector bargaining taken by the various states, but many other enactments exist which infringe upon a bilateral system of bargaining. Collective bargaining, on the other hand, in the private sector is restricted only by the labor acts themselves, and the constitutional protections guaranteed to every citizen.[27]

The number of statutory enactments dealing with public employees in a state may act as a limiting factor on the scope of bargaining. For example, public employer pension and retirement benefits are often regulated by state laws, or state-wide tenure laws may have been enacted which restrict certain issues for teachers when at the bargaining table. Another group of enactments which often come into conflict with public employee bargaining designs are the state civil service regulations.

Because civil service legislation deals with the recruitment, promotion and discharge of public employees it often comes into direct conflict with unionization in the public sector. The unions want to bargain with the public employer over matters covered by the civil service laws but the employer may refuse on the grounds that such matters reside solely within the discretion of the civil service agency. Accordingly, the unions may not only have to bargain with one agency, but with several agencies at a time. On the other side, an agency head will often be uncertain as to the scope of issues he can deal with due to restraints created by the civil service laws. The problem which occurs when a number of enactments treat the same bargainable subjects is peculiar to the public sector and has only succeeded in further confusing the issue of collective negotiations with public employees.

The Right to Strike

Perhaps the single greatest distinction existing between the public and private sectors is that strikes in the public sector are generally prohibited, either by court rulings or legislative enactments. Public strikes have been considered through the years to be contrary to the public good. The view generally held today by government was verbalized by President Franklin Delano Roosevelt in a letter to L.L. Stewart, President of the

National Federation of Federal Employees, written in 1937: "/P/articularly I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees . . . A strike of public employees manifests nothing less than an intent on their part to obstruct the operation of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it, is unthinkable and intolerable."[28]

Other distinctions are drawn between the private and public sector militating against the use of the strike in the public sector. It is often argued that the public employee, by the very fact that he is employed by government, has a "higher" obligation to his government to keep it in operation than does a private citizen to a private employer. An outgrowth of this argument is that public employees should be denied the right to strike because they are engaged in such "essential services" that it would be a violation of public policy to allow them to strike for self-serving ends. The validity of this distinction between the public and private sector has often been questioned. Many writers have been unable to distinguish between private transportation companies and public transportation systems, or between private hospitals and public hospitals, or between private and public colleges. All those parties found in the private sector, though engaged in essentially the same work as their public sector counterparts, are given the right to strike. Although the "essential services" argument is indisputable with respect to such public servants as policemen and firemen, its validity when applied to other public employees has raised doubts.[29]

Even though many of the arguments used to distinguish between the public and private sectors, and the implications of the right to strike, are open to attack, there remain significant differences between strikes in the public and private sectors.

An analysis of some of the major issues in collective bargaining in higher education and their statutory treatment has enabled the author to offer recommendations for consideration by educators and lawmakers as they revise and create public employment statutes which affect institutions of higher education.

The conclusions and recommendations are directed toward giving public employment relations statutes clarity of purpose and consistency in approaching collective bargaining in higher education. This is necessary because of the vital role that a statutory structure serves in collective bargaining, and the fact that little attention by commentators and legislators has been accorded to statutory formulation, especially as it affects the negotiations process on campus.

Findings of Fact

The structures of the twenty-eight statutes analyzed in this study were very similar to the National Labor Relations Act and the state labor acts which it has spawned. For example, 85 per cent of the statutes guaranteed a bargaining agent exclusive representation, 85 per cent stated that the "community of interest" formula or flexible formulas as created by administrative agencies should be used as the basis for unit determination, and 70 per cent of the statutes deferred to the "wages, hours, and conditions of employment" format as the proper items to be negotiated. The above statutory structures are much the same as the NLRA requirements, even to the extensive borrowing of language.

One of the most enlightening comparisons in the study has been to analyze the statutes in terms of two philosophical approaches toward collective bargaining in higher education: the shared authority and collective negotiations models. Out of those issues examined, the analyses revealed that the statutes, as formulated, encouraged the development of a collective negotiations approach on campus. Although only 45 per cent of the statutes fell within the collective negotiations model in the area of exclusive representation, this result is explainable because the statutes preserved some form of individual rights of representation. But, in all fairness it must be noted, the rights of individual representation were generally very limited and of an informal nature, greatly diluting the actual effectiveness of any individual efforts.

The other analyses disclosed that the collective negotiations model was generally statutorally supported. About 75 per cent of the statutes favored a collective negotiations approach for unit determinations, and 70 per cent preferred the collective negotiations prescription for determining the scope of bargainable issues. Accordingly, in the eighteen states where the examined statutes are found, the negotiations procedures will generally adhere more closely to the industrial sector concepts of collective bargaining.

The analyses showed that, of the issues examined, state legislatures preferred to generate statutory requirements in broader terms, leaving specific interpretations and applications to appropriate labor agencies.

For example, 75 per cent of the statutes required that the status of a representative be supervised by an agency. Eighty-five per cent of the statutes stated that units should be determined by administrative agencies, and of those statutes the majority only provided general requirements for the agencies to follow. Perhaps of greatest importance was the fact that 75 per cent of the statutes supplied general statutory restrictions on the scope of bargaining while the appropriate administrative agencies were given wide discretion in determining which issues were negotiable in any given situation.

Thus, the administrative agencies were the single-most significant element in the fashioning of collective bargaining in the eighteen states.

Twenty-four of the twenty-eight statutes examined required that an agent, once elected, was to become the exclusive representative for all employees within the designated unit. Only two statutes, both in California, opted for another formula and two other statutes were unclear in their statutory requirements.

Apparently the overwhelming majority of state legislatures agreed with the reasoning found in the recommendations of the Connecticut Committee on Collective Bargaining in Municipalities where it was stated: "The commission is convinced that this concept of exclusivity is essential to the development of sound collective bargaining procedures in municipal juridictions. This latter provision does not foreclose the right of a minority organization to discuss matters of mutual concern with municipal officials, but it does suggest that the municipal official need not bargain with a minority organization."[30]

The "community of interest" formulation has been the most common basis for determining appropriate units used by the NLRB. The analyses of public employment statutes undertaken by the author also showed that half of these enactments provided specifically that the "community of interest" be considered in unit determination. The rest of the statutes had no specific provisions, but indications from the cases analyzed were that a good proportion of the courts and administrative agencies also used this formula as a criteria for unit determination.

Supervisory and non-supervisory personnel were segregated for unit purposes in eighteen of the twenty-eight statutes examined. Eight of the statutes also allowed supervisors to form units and bargain collectively with their employers. But, there existed few statutory guidelines as to where the line between supervisor and non-supervisor was to be drawn. Consequently, this caused great confusion in the education arena because of the peculiar hierarchical structure that is found in higher education.

As already noted, the "wages, hours, and conditions of employment" formula is commonly used in the private sector to determine which issues are negotiable. Seventy per cent of the public employment statutes analyzed followed the same or similar formula as that created for the private sector. Of further interest was the fact that these statutory formulas appeared to be open to expansive administrative rulings because there were few, if any, specific guidelines to help determine which issues are bargainable as defined by the regulations. Also, only a small number of enactments provided any indication as to which items were non-negotiable.

Statutory analyses confirmed that, though all statutes examined applied to some form of higher education institutions, only two of them ever referred to the need for considering educational problems when creating a collective bargaining format. In the areas of representation and unit determination

there were no statutory references to educational considerations, or guidelines for agencies if flexible procedures were allowed. The scope of bargaining provisions, where academic versus non-academic questions are most acute, identified two statutes which addressed themselves to educational matters.

The case analyses indicated that educational considerations were used in only five of twenty-seven cases examined. The tribunals generally based their explanations for a particular statutory interpretation on past jurisdictional practices, equitable, or legal reasons. The dearth of educational or academic references in both the cases and statutes established that state legislatures do not distinguish educational institutions from other public employment areas, or specifically allow for any unique features which might exist when negotiations appear on campus. Rather, there is a tendency to treat all public employees the same, which is further exacerbated by the interchange of public and private sector labor precedents, and uniformity of precedents within the public sector.

The analysis of statutory unit requirements disclosed that legislatures made administrative agencies almost totally responsible for determining appropriate units. The agencies were provided with broad guidelines or no statutory directions. Even the policy preference for state wide or local units was generally relinquished to administrative agencies. This resulted in great confusion among tribunals as evidenced by the fact that almost half of the cases dealing with statutory interpretations were unit problems. Also analysis revealed that similar statutory structures often produced opposite results, depending on the tribunals and prior precedents in a particular state.

An examination of cases confronted with questions of statutory interpretations confirmed that the various labor tribunals had difficulty in discovering the intent of the statutes. Two-thirds of the cases ended in determinations which actually were contra the patent statutory language, or the results made them too difficult to classify. Also, the tribunals generally referred to past practices in the private or public sector, or to equitable and legal considerations for the basis of decision. Only one-third of the tribunals made any attempt to explore the statutory history in order to survey the intentions of the legislatures. As final evidence of this confusion, 22 per cent of the tribunals indicated they felt the statutes were clear, while the rest either stated that the statutes were unclear or so broad that an agency could promulgate its own interpretation.

While only one-third of the cases examined were heard by courts, the courts referred more often to the statutory history, rules of statutory construction, and the actual facts of a particular case than did the administrative tribunals. Courts also found the statutes to be clearer than

did the agencies, and courts appeared to adhere more closely to the patent statutory language than the other tribunals.

In contrast, labor tribunals other than courts were more eager to find the statutory language broad in nature, and then developing their own approaches to collective bargaining in higher education.

General Conclusions

One of the most obvious conclusions to be drawn from this study is that, given the present atmosphere prevailing among legislators and faculty members, collective bargaining in higher education is going to greatly increase in the next decade. Sufficient proof exists that once statutory permission is given, collective bargaining in the public sector has quickly expanded and, state legislatures are now passing public employment relations statutes at an increasing rate.[31]

Perhaps of more importance is the apparent shift in attitudes occurring among faculty, especially in the senior colleges. A recent survey conducted by *The Chronicle of Higher Education* confirms that out of 254 institutions with collective bargaining agents, only 50 are four year institutions. But this represents an almost 200 per cent increase in a two year period.[32] A rapid expansion of bargaining at both junior and senior college levels, coupled with the recent commitment of the AAUP to collective bargaining, assures its place as a viable force in education.

The majority of public employment relations statutes have borrowed too extensively from private sector enactments. Due to the success of the NLRA among private sector employees, and the fact that most legislators are very familiar with the NLRA structure, the state public employment statutes have copied many of the private sector formulas. Even in the states which did set up commissions to study public employment, the reports submitted to the Governors made recommendations similar to those statutes already existing in the public and private sectors.

There are great distinctions between the public and private sectors, and even among employees within the public sector. Statutory structures which attempt to force these employees into a mold made for another group will encourage disrespect for those laws causing an increase in strikes and work stoppages, and an erosion of essential services.

Another outgrowth of extensive borrowing from private sector enactments for public employment statutes is that these statutes encourage trade-unionism in higher education. Present public sector statutory structures often mandate that lines be drawn between supervisory and non-supervisory personnel, and that an employer-employee relationship be identified. Both of these concepts are essential to trade-unionism, and to the growth of those unions adhering to the trade union model in higher education. But, the peculiar nature of education and the educator make it very difficult to draw arbitrary distinctions between employers,

supervisors, and employees, and to do so is often antithetical to the actual governing process. As stated by Sands:

> The differences between academic institutions and others, such as . . . business and industrial enterprises from which a great deal of the administrative structure and methods of many colleges and universities have been copied and from which the concept of collective bargaining comes, are vast and fundamental. Mechanisms for dispute settlement and distributions of the power of decision should not be adopted blindly, uncritically, or without adaption to suit the particular needs of the institution to which it is being applied . . . conventional legislation on the subject of collective bargaining in either private or public employment is not well suited to structure and regulate academic collective bargaining.[33]

One of the most enlightening revelations found by this study is that very little is being done by educators and legislators to provide alternatives to collective bargaining on campus. Much of the literature, and a great amount of the present effort, is diverted toward arguing the viability of unionism in education *per se*. There have been a few alternatives proposed, such as the Scranton Plan of President Dexter Hanley, or the shared authority mode. But, in general the proposals which have been made follow the traditional collective bargaining route or join forces with the anti-bargaining groups. Rigid lines have been drawn too long. It appears time for alternative courses of action to be examined so that faculty members will have a choice in determining how they want to gain a voice in the decision-making process.

The shared authority model indicates that one possible approach to negotiations' problems is to allow limited collective bargaining and a strong faculty senate on the same campus. But, the AAHE Task Force recognizes that ". . . the relationship between the bargaining agency and the senate will be highly unstable."[34] This is true because of rivalry which may develop as the faculty union attempts to expand the scope of bargaining issues.

Given the nature of collective bargaining, a bargaining agent may also have difficulty co-existing with any other governance structures because of the need for loyalty of a total membership in order to effectively pursue a power relationship. Thus, faculty unions often see any formula which detracts from exclusive control as a threat to their existence and will refuse any efforts toward a detente with other governance structures or organizations on campus.

United States Department of Labor statistics show that approximately 25 per cent of those public employees unionized in 1971 were teachers. Yet, the statutory analysis undertaken by this study indicates that few of the statutes give any special recognition to the distinctive forms and

labor problems of the teacher, especially the college teacher. Effective legislation for collective bargaining at the college level should take into account the unique characteristics of the academic community. Also, the statutes must provide specific guidelines to courts and administrative agencies which would require them to determine the impact of any labor policy decision on the educational goals of the institution. At present, such requirements do not exist.

Twenty-four of the twenty-eight statutes examined require that the bargaining agents become the exclusive representatives of the faculty in all negotiations. Although the faculty are given some individual rights in many of these statutes, such rights are normally limited. This effectively prevents a faculty member from going to the administration on any individual course of action unless he has first received approval from the bargaining agent.

Even without the exclusive right of representation, collective bargaining may act as a damper on individual actions. Many times bargaining agents will attempt to prevent individual activities by obtaining broad guarantees of union rights in a contract. Or, the pressure of rival organizations on campus may cause the administration to refuse to hear the grievances of individuals for fear of further exacerbating an intense situation. Additionally, as already noted, because the strength of unionism depends so much on concerted actions, it becomes essential for unions to work to prevent any form of individual activity.

Statutory criteria in public employment generally favor bargaining over "wages, hours, and conditions of employment." This has not provided much assistance, though, in distinguishing bargainable and non-bargainable issues. Statutory and case analyses also indicate that due to the broad language, the labor tribunals often fail to draw any distinctions between academic and non-academic matters. Furthermore, the nature of the faculty union is such that, as a representative of professionals, it is continually seeking to expand bargainable matters due to the wide range of concerns found among its constituents. As stated by the AAHE Task Force:

> The record of collective bargaining in industrial settings reveals a steady expansion of union concern and influence to topics previously identified as management prerogatives. A parallel series of developments may take place in higher education. For example, the determination of admissions standards may be assigned initially to a senate as an issue of educational policy. This issue, however, may soon appear on the formal bargaining agenda because of the consequences of admissions policies on faculty work loads.[35]

Some statutes have attempted to put limitations on the scope of bargaining by allowing the public employer to negotiate management rights

clauses.[36] This, too, may not be very helpful because of the difficulty in determining what are managements' rights in education.

One of the major accomplishments of the NLRA is that it has established a uniform treatment of labor problems in the private sector. This uniformity has successfully minimized disruption and chaos incident to labor relations among private sector employees. No such uniformity in approach exists in the public sector.

In light of the failures in labor relations on campus, and the fact that teacher organizations have a nationwide constituency, a move toward uniform treatment of teachers can be helpful. Evidence indicates that one of the major causes of labor unrest are the "whipsawing" techniques which unions can use if certain employees are granted privileges not available to others. For example, college teachers in California may no longer be satisfied with their treatment after the bargaining successes of faculty under the new Pennsylvania and New York statutes. California teachers may therefore agitate for some form of parity. A uniform approach to faculty members, on the other hand, in California, New York, and Pennsylvania may prevent much of the present campus discontent.

Recommendations

Based on a review of the literature, an analysis of public employment relations statutes, and pertinent cases interpreting the statutory language of those statutes, the author will now offer recommendations to be used in developing and restructuring public employment statutes as they affect higher education institutions. The following recommendations will be concerned with developing statutes which recognize higher education as a distinctive part of the total public sector. They will also be concerned with eliminating inconsistencies in statutory approach, while creating more uniform and equitable treatment of the professional on campus.

Special Statutory Recognition of Higher Education Problems in Public Employment Should Be Provided

State legislatures have almost totally ignored the special problems of bargaining in higher education. Instead, as shown by the statutory analysis found in this study, present public employment statutory structures follow, with slight deviations, their private sector counterparts. But, sufficient evidence as to the uniqueness of public higher education and its concomitant employment problems exist to suggest that special statutory recognition is necessary. Therefore, it is recommended that public employment relations statutes should have additional sections which provide specific formulas and guidelines for higher education. Or, in the alternative, legislatures should evolve new structures specially formulated for collective bargaining in higher education.

The main benefit to be gained from this recommendation is that carefully drafted legislation, directed toward one group of public employees, can significantly contribute to the smooth implementation of the bargaining process by recognizing the peculiar characteristics of that group. Extensive borrowing from other sectors by labor tribunals will be prevented, while all parties at the table can feel confident that their particular needs will be recognized because of a more personalized statutory structure. It should be cautioned that such a recommendation may also open a door to the demands of every identifiable group of employees in the public sector that they, too, should have special recognition. To avoid overspecialization of enactments, it is suggested that state legislatures set up criteria governing the general form and focus of public employment statutory structures. As an example, a legislature could designate four basic employee groups within the public sector, i.e., craft or blue collar workers, service employees, security forces, and white collar or professional employees. Specific statutes directed toward the four main employee categories could be developed and then specialized distinctions within the larger categories formulated. Accordingly, the advantages of dealing directly with the problems of one group of employees without overburdening the legislative and judicial systems would then be feasible.

Another benefit to be derived from special legislation is that once the statutory guidelines are established, the legislature can allow more flexibility within that enactment than if the statute were general and comprehensive in nature. If the statute, for example were specifically directed toward labor problems in education then constant references to exception for special circumstances or certain groups would be eliminated. Instead, the specialized statutory structure would allow the legislature to refer many negotiation questions to labor tribunals and other parties with specialized expertise in the field of education.

Finally, by creating a separate statutory structure for higher education the concepts of professionalism and institutional responsibility can be more easily maintained than if treated with all other employee problems. As stated by Doherty and Oberer:

> To the extent teachers are treated fungibly with other employees, are dealt with in the matter of collective negotiations by the same agencies, standards, and procedures, to that extent the professionalizing force will be dulled and perhaps lost. Typical employee goals and standards, with a stronger tendency to collective protection of mediocrity, even incompetence, as opposed to collective encouragement of aspiration toward excellence, of the seeking of prestige and personal satisfaction through service rather than mere material reward.[38]

Statutes Should Guarantee the Right to Bargain Collectively in Public Higher Education

Another acute problem presently facing bargaining in higher education is that statutes are often unclear as to application and extent of coverage. It is recommended that each state pass statutes which specifically guarantee the right of collective bargaining to members of the academic community. Although this will encourage collective bargaining in regions previously untouched by public sector unionism, the long range effect will be to prevent harmful power struggles as faculty members attempt to obtain rights already granted their colleagues in other states. Furthermore, positive statutory guarantees will only legislatively recognize what is now being determined as a legal right by the courts. Failure to mandate full rights of bargaining to faculty members is a rearguard action which can create undue resentment, as does any delay of inevitable change, instead of developing the rapport necessary for mutual solutions of problems. As stated by the Task Force on State and Local Government: "The weight of the evidence suggests that the enactment of positive legislation is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work. Such legislation will not eliminate all work stoppages. But, it will produce rational methods for dealing with them. It seems plain that in the long run more effective and orderly government will result from legislation setting out the basic guidelines for employee relations."

State Legislatures Should Appoint Commissions to Formulate Statutory Recommendations

It is recommended that each state establish commissions to study the public employment problems in the states and to make recommendations for state laws. It is further recommended that "mini-commissions" be created to study the problems of special groups of employees in the public sector. Many of the state legislatures do not have the luxury of time and expertise available to them as does the United States Congress. Consequently, state enactments often become law without proper consideration by the legislatures. Public employment commissions would be able to provide the expertise necessary to formulate positive recommendations based on accumulated experience and the particular problems in any one state.

The main advantage that this recommendation offers for higher education would be the opportunity to have educators and labor experts sit down together and evolve policies reflecting the realities of collective bargaining and the needs of educational institutions. Furthermore, faculty, unions, professional associations, and administrators would all have an occasion to be heard before any statutory structure is imposed on them.

Allowing all parties to be a part of the legislative process could have the additional advantage of ensuring broad based support for the final statute.

Specialized Administrative
Machinery Should be Establihsed

As cited by the findings of fact, one of the most important elements of the collective bargaining process is the agency which administers the statute. It is therefore recommended that statutes create administrative agencies composed of educational and labor specialists to deal specifically with negotiations in higher education. Robert Gorman lends support to this position when he states:

> Many of the decisions to be made by any agency charged with administering a labor-relations statute must obviously be informed by a special familiarity with the traditions, interests and needs of the employees in question . . . . Some states have created a special agency with authority limited to the field of public employment. Obviously, the latter alternative is to be preferred. Wherever possible, an effort should be made to refine the scope of the power even further, so as to better service the peculiar demands of the professional engaged in higher education.[39]

The specialized administrative agency could function within the framework of a comprehensive statute or a statute specifically written to deal with educational institutions.

A major reason for supporting an agency with specialized expertise in higher education labor relations is the particular focus that such a forum could give to institutional problems. For example, the question of unit determination may not lend itself to an easy solution given the difficulty in determining who is the employee and employer in any educational institution. But, an agency that possesses complete familiarity with the structure and traditional functions of many of the actors in higher education, plus possessing the ability to consider any final determination in light of educational, as well as labor policies could provide a more satisfactory solution. Collective negotiations in higher education presents a mixed picture of traditional labor questions and new policy problems which can only be solved through innovative approaches rather than relying on previous public and private labor precedents. Such innovative solutions may only be available if the arbitrators are well versed in educational issues.

Another advantage of the specialized administrative agency is that public and professional employees and employers, especially within the educational services, are suspicious of the traditional trade-union structures which have controlled collective bargaining. Therefore an agency

familiar with the unique problems found in education will be much more likely to have the confidence of all parties which, in turn, can act as a catalyst for a quick solution to any dispute which may arise. Once parties are confident that an administrative agency will give them a full and fair hearing then they are much more likely to seek advice from and accept solutions imposed by such an agency.

A final consideration in the creation of specialized administrative agencies is that existing state machinery, or even new machinery dealing only with the public sector, will be very hard-put to provide adequate services given the expanding nature of collective bargaining. A generalized state agency would be forced to constantly shift the nature of its deliberations in light of the number and type of employees covered by a comprehensive labor statute. On the other hand, a specialized agency will be able to gain both competence and confidence allowing it to handle a heavy volume of cases quickly and fairly. Because labor problems are usually volatile and therefore in need of immediate attention any formula which provides the possibility of speedy solutions to these questions would appear desirable.

Statutes Should Limit the Use of Private Sector Precedents

The successes of the National Labor Relations Act, and the procedures developed by the National Labor Relations Board continue to influence public sector legislation and administrative determinations. In order to prevent continual dependence by courts and administrative agencies on private sector precedents, it is recommended that the public employment statute clearly limit the application of such precedents in the public sector. The New York Taylor Law is an example of a statute which contains such a statutory proscription: "In applying this section, fundamental distinctions between private and public employment shall be recognized and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent."

It is wise to explore previous enactments and rulings from other sectors for beneficial directives, but such principles should be included within the public employment statutes. This would have the advantage of statutorally incorporating those applicable aspects of the private sector labor experience without becoming dependent on its legal precedents. Such a clause could also act as a signal to those at the bargaining table and those called on to interpret the statute that new procedures based on actual problems must be developed. State legislators, therefore, have an opportunity, often unavailable when new legislation is created, to draw on previous experience without becoming tied to the past. As noted by George Taylor: "To achieve sound government-employee relations, a future has to be invented. Although lessons can be learned from the private

sector, in many respects new roads have to be charted. Adherence to all the assumptions upon which private collective bargaining has been predicated is not to be expected. Those of us who have lived long with problems in the private sector tend to emphasize similarities between the problems of the public sector and, doubtless, minimize the crucial differences."[40] The adoption of an exclusionary clause as proposed by this recommendation would ensure that "crucial differences" are recognized.

Public Employment Statutes Should
Outline Applicability of Other
State Enactments

One of the privileges vested in a state legislature is to repeal, restrict, or clarify any existing state laws. It is recommended that state legislatures exercise this privilege by clearly marking the parameters of the public employment statute in its relationship with existing state enactments. Great difficulties are presented to all parties at the bargaining table if they are uncertain as to whether the scope of bargainable matters are restricted by lack of statutory authority or conflict with other statutes. Civil service laws, budgetary and appropriations laws, and laws designating the actual powers of state agencies are examples of enactments which often create difficulty in the bargaining process because they overlap or conflict with public employment relations statute.

The advantage of a statutory enactment which clearly outlines the limits of its powers, and the powers of other statutes as they affect public employment bargaining, is that it prevents the parties from entering into unenforceable agreements. Also, it discourages one party from later reneging on contractual items by asserting that another state statute prohibits an accord on particular matters. Finally, lack of a conflict of laws helps create the stability necessary for bargaining to take place on issues, rather than to be overshadowed by legal maneuvering.

Just as the relationship of the public employment statute to other enactments must be clarified, the legal rights and privileges of all parties at the negotiation table should be statutorally guaranteed. Such matters as adherence to the principles of academic freedom and due process may appear to be so much a part of the academic world that they need not be formally incorporated in a statute. In actuality though, many basic questions as to the legal rights and responsibilities of the parties have caused great problems at the bargaining table. The establishment of such guarantees as a matter of course in statutory structures will prevent unnecessary delays and assure debate over substantive issues.

State Agencies and Commissions Should
Be Required to Exchange Information

Even though the general thrust of the recommendations of this study is that special statutory recognition must be given to higher education institutions, development and administration of these statutes should not take place in a vacuum. Therefore, any public employment statute should require its administrative agencies to develop procedures for the exchange of pertinent data between and among various state agencies and organizations. Furthermore, it is recommended that the public employment statutes require an exchange of data and procedures on a regional basis. The major reason for these recommendations is to help secure more uniformity and predictability in labor relations between state agencies and among the several states. They will also help prevent various groups of employees from "whipsawing" their employers by making any actual agreements, and rationale for those accords, available to all parties in a jurisdiction or region.

The Advisory Commission on Intergovernmental Relations made a similar recommendation. It noted:

> Before labor and management can hope to come to an agreement on a dispute, they need to reach an understanding on the facts at issue. It seems advisable, then, in the interest of facilitating discussions and promoting mutual trust and good faith, that everything possible be done to make the same public personnel data available to all parties . . . . State Government has a stake in encouraging all sides to exchange relevant personnel data since it has a paramount interest in developing and maintaining healthy public employer-employee relations.[41]

The same rationale is also applicable for exchanging personnel and labor relations data on a region-wide basis. The opportunity for representatives of various states to discuss public employment relations in their states with each other could lead to an elimination of much of the duplication of effort which presently exists. It would also allow the government employer to present a more united front, which appears both logical and desirable as local employee organizations become affiliated with national unions whose goals do not differ greatly from state to state. Knowledge of the facts and a more uniform approach to public sector labor problems will free the parties, when at the negotiating table, to abandon much of the initial procedural bargaining and move to more substantive problems.

Exclusive Representation, with
Guarantees for Individual
Actions, Should be Granted

Although exclusive representation of all employees in a unit appears antithetical to many principles found within the academic community, it is recommended that public employment statutes guarantee the rights to exclusive representation for an unchallenged period of twelve months. One further guarantee should be provided: any faculty member has the right to pursue individual bargaining and all requirements for compulsory membership in the majority organization should be rejected.

Granting a bargaining representative the right of exclusive, and unchallenged, representation will allow the agent to negotiate with the institution instead of constantly protecting its position from disaffected groups. As stated by Doherty and Oberer, a formula other than exclusive representation ". . . . transfers to the bargaining table the competition of views between contending teacher organizations instead of resolving them at the representation stage, and thereby impairs the process of reaching agreement through collective negotiations."[42] In confirmation of these observations, overwhelming evidence does exist that exclusive representation is a most essential ingredient before rational bargaining can be conducted.[43]

On the other hand, the special features of the academic community demand that the individual faculty member be able to decide his own future if he so desires. The right to bargain individually will act as a catalyst for those who believe in the merit principle, or strongly disagree with unionism in higher education, to have sufficient freedom to pursue their own academic and economic course. The guarantee of individual bargaining rights would provide the additional advantage of keeping faculty unions more responsive to the needs of all members of the unit because of the option that a faculty member would have to seek his own contract. Accordingly, exclusive representation with guarantees for individual rights would continue to allow effective bilateral bargaining without drastically limiting the ability of a faculty member to maintain a singular identity.

One of the greatest problems faced by those states instituting this recommendation will be the possibility that the employer institution will attempt to undercut the exclusive bargaining agents power by offering large numbers of faculty members better individual contracts than that sought at the bargaining table. It is therefore proposed that any state adopting this recommendation should also create a strong unfair labor practice clause in its public employment statute. Such a clause should make it illegal for the employer to negotiate with any group except the exclusive representative and those individual faculty members who have manifested a strong desire to negotiate on an individual basis with the institution. But, a strong unfair labor practice clause should also act to protect the employer and those who wish

to bargain individually by preventing a bargaining agent from restraining or coercing faculty members from exercising their rights to pursue a course of action outside that undertaken by the exclusive bargaining agent. Although a full discussion of unfair labor practice clauses is beyond the scope of this study, it should be noted that experience has shown such clauses do act as an effective deterrent to attempts by both employer and employees to undermine the bargaining process by empowering the courts and labor tribunals to prevent any activities showing "bad faith" or a failure to adhere to the spirit, as well as the letter of the law.[44]

Negotiating Units on Campus Should Parallel the College or University Structure

The statute and case analyses confirm that serious distortions in the collective bargaining process in education often occur because of a proliferation of bargaining units. In order to prevent fragmentation of units, it is recommended that the statute require units in higher education to parallel the institutional structure. Therefore, if there is a state-wide system such as the State University of New York the units should be state-wide, but if the final negotiating authority is on a county or region basis such as with community colleges, then the units should be drawn on that level. The major consideration is that a union should bargain with an employer who has final authority in order to prevent the chaos which results when agreements are nullified or altered by higher authority.

One of the greatest problems in higher education bargaining is the wide diversity of interests found among the various faculty members. This diversity often leads to pressure for bargaining units composed of members of the history department, architecture, or business school. Even though certain conflicts of interest may appear when all faculty members are put in a single unit, the end result will be more meaningful negotiations for all parties. The employer will be able to concentrate on reaching a final agreement on the major issues rather than having its efforts divided among many units with a large number of demands peculiar to each constituency. The single unit will also prevent inter-union rivalry and its accompanying "whipsawing" methods on the employer by eliminating the possibility of a number of bargaining agents on a single campus. Often these bargaining agents will become more interested in escalating their demands *vis-a-vis* other agents, than pursuing a rational dialogue with the public employer. The advantages of this recommendation also accrue to the bargaining agent. The union will be exposed to a larger membership pool with a concomitant increase in dues and a broader power base, enabling it to bargain from a greater position of strength.

A trend toward larger bargaining units has the danger of continuing to exacerbate one of the initial reasons for faculty turning to collective

bargaining: the removal of decision-making powers from the local to a central or state level. In order to alleviate this concern, it is also recommended that, if a single unit exists which covers many campuses, the statute should provide for single campus bargaining on basic problems peculiar to that campus. This would allow for a certain amount of diversity within the overall framework of a single unit and single contract.

Statutes Should Allow Most Campus Professionals in a Single Unit

Public employment statutes should allow first line supervisors, full-time faculty members, part-time faculty members, and professional support personnel to be included in the same unit. The unit should include all personnel except those who, after a close investigation by the state legislatures, statutory commissions and agencies, are determined to be the representatives for all practical purposes of the government employer.[45] This recommendation is intended to reflect the realities of professional relations in higher education and to negate the artificial employer-employee concepts presently found in the majority of public and private employment statutes.

Education, as distinguished from the majority of other employment areas, is composed of professionals at all levels. On many campuses there is a sharing of authority which makes it difficult to classify individuals as "management" or "employees" according to traditional private sector definitions. Furthermore, the common interests of these professionals because of the nature of the academic institution often outweigh any conflicts which may exist if all are joined in a single negotiating unit. Because of the common bonds that do prevail, and the need to further these interests, a unit composed of most professionals in an institution contributes to educational, as well as labor harmony, by putting the majority of professionals on the same side of the table.

Statute Should Enumerate Negotiable and Non-Negotiable Items

There is extensive pressure to constantly enlarge the scope of bargaining in higher education. To counteract this movement, it is recommended that public employment statutes contain specific enumerations as to which items are, and are not, negotiable.[46] The statute should also include clear directives to the appropriate administrative agency on what considerations must be given attention when making scope of bargaining decisions on questionable issues.

As this study has shown, it is the propensity of legislatures to formulate general scope of bargaining language, leaving final decisions

to the parties and administrative agencies. The net result has been an ever broader scope of bargaining, especially among parties in the education enterprise. One of the major advantages of having specific limitations appear in the statute is that they will serve notice to all parties that an ever widening scope of bargaining is against state policy, and therefore some issues can not be compromised by putting them on the bargaining table. It will also provide an opportunity for legislators, labor experts, and educators to fully discuss at legislative hearings the ramifications of allowing bargaining over certain issues in education, without being under the pressure or constraints of making a decision during an actual crisis. Finally, specific statutory limitations will eliminate the need for the courts or administrative tribunals to constantly be forced to make rulings on a case-by-case basis without sufficient indication of the desires of the legislature.

Of course, it would not be desirable, nor feasible, for the legislature to enumerate every negotiable item. For that reason, it is necessary to adopt the recommendation for specific directives to administrative tribunals as to the appropriate criteria to be considered when questions arise. Statutory directives will allow the flexibility of *ad hoc* considerations without gross deviation from state policies on bargaining in higher education.

Academic Issues Should Not Be Negotiable

It is recommended that state legislatures distinguish between academic and non-academic matters and prohibit negotiations over academic matters. Determining which issues are academic in nature, as already noted, is beyond the scope of this study. But, state legislatures in conjunction with labor commissions and administrative agencies should consider the traditional distinctions drawn by commentators along with the specific administrative and institutional structures found in their state in order to establish a policy on academic and non-academic issues.[47]

Academic issues should not be a part of the formal bargaining process because of the uncertain direction that educational policy may take if submitted to the stresses of power relationships and constant compromise. In addition, due to the lack of effective market restraints in the public sector, academic policy-making could actually be taken over by the unions as the employer is forced to constantly retreat in face of an expanding scope of bargaining. Furthermore, this expansive nature of collective bargaining in the public sector will continue to exist as long as the public employee is able to exert pressure on the government through its citizens' demands for continuation of "essential services," no matter the cost. Finally, the educational community has a responsibility to the public which could be abrogated if its main function, the transmitting of knowledge, becomes tied to partisan politics and the tight restraints of a formal contract. Statutorally distinguishing between academic and non-academic issues would not only

have the advantage of removing the aforementioned obstacles, but could allow educational policy-making to take place within the rules of rational discourse.

Guidelines between Unions and Other Campus Organizations Should Be Established

Once a union becomes exclusive representative of the appropriate bargaining unit, its relationship to other organizations on campus must be ascertained. It is therefore recommended that public employment statutes establish guidelines as to the powers and duties of other organizations and their affiliation to the administrative structure of the institution. For example, some campuses may have faculty senates which are given specific responsibilities by charter or administrative decision. There is, therefore, a potential conflict between faculty senates and unions as the bargaining agent attempts to expand its sphere of interest. Guidelines outlining treatment of such bodies would help divert power struggles and allow both the union, senate, and other organizations to perform viable functions within the institution.

When collective bargaining appears on campus, it cannot be assumed that all other administrative organizations are to be ignored, especially if a state adopts the shared authority model as its approach to negotiations in education.[48] The above recommendation would open the door to alternative approaches, as well as protect the rights of faculty members to maintain other ways, outside the formal negotiations process, to influence institutional decision-making.

The Rationale for Enactments and Interpretations Must Be Provided

The final recommendation of this study is that, in order to make statutory policy clear to all parties, the public employment statute should contain written rationale for its various statutory sections. It is further recommended that administrative agencies and courts be required to state their reasoning when called upon to interpret these statutes.

The case and statutory analyses demonstrated that great uncertainty existed as to what policies statutes were actually attempting to promulgate. Requiring written rationale in a statute will help frustrate this present lack of clarity, and to make statutory policies more definite. Collective bargaining in education is a new phenomenon. If it is the intention of the legislature to provide a different direction for

negotiations in education this policy must be clear to the parties, and to those commissioned to make the policies work. Therefore, it is also necessary for the various tribunals to expose their reasoning for statutory interpretations so that the statutes and interpretations can be compared, and any miscalculations corrected before time makes them accepted policy.

A Final Observation

Collective bargaining in higher education will, in the next decade, be one of the single most important factors in the formulation of administrative policies in colleges and universities. Therefore, it is necessary to develop new and alternative models for employment relations in higher education. The recommendations in this study do not advance any radically new concepts. Rather, an attempt is made to offer suggestions as to how traditional theories of collective bargaining can best be adapted to the peculiar problems found on campus. But, they are also the first step towards a final answer. If these recommendations are adopted, much needed stability in bargaining relationships could result. This would provide the atmosphere, and flexibility, necessary for further research and development until a totally satisfactory approach is discovered. To that end, the author nopes this study is a beginning.

FOOTNOTES

1. Donald H. Wollett, "The Status and Trends of Collective Negotiations for Faculty in Higher Education," Wisconsin Law Review, MCMLXXI (Winter, 1971), p. 2.

2. National Labor Relations Act (Wagner Act), sec. 2(2), 26 U.S.C. 152(2) 1954.

3. Chanin, Negotiations in Public Education - Developing a Legislative Framework (Denver, Colo.: Education Commission of the States, 1971), p. 7.

4. National Labor Relations Act, 29 U.S.C. secs. 151-168 (1970).

5. National Labor Relations Act, 29 U.S.C. sec. 152 (6) (1970).

6. National Labor Relations Act, 29 U.S.C. sec. 161 (a) (1970).

7. Harry H. Wellington and Ralph K. Winter Jr., "The Limits of Collective Bargaining in Public Employment," Yale Law Journal, LXXVIII (June, 1969), p. 1107.

8. See William J. Kilberg, "Labor Relations in the Municipal Service," Harvard Journal on Legislation, VII (November, 1969), pp. 2-6; American Federation of State, County, and Municipal Employees, AFL-CIO v. Woodward, 406 F. 2d 137(8th Cir. 1969).

9. Federal Tort Claims Act, 28 U.S.C. secs. 2671-80(1970). The Federal Government can be sued for certain *tortieres acto* committed by its agents.

10. Norwalk Teachers Association v. Board of Education, 138 Conn. 269, 83 A.2d 482 (1951).

11 Howard Anderson, "Labor Relations in the Public Service," Wisconsin Law Review, MCMLXI (Spring, 1961), p. 619.

12. See generally, Kilberg, "Appropriate Subjects for Bargaining," p. 179; Kilberg, "Labor Relations in the Municipal Service," p. 1; Morris, "Public Policy," p. 551.

13. Jack Steiber, "Collective Bargaining in the Public Sector," in Challenges to Collective Bargaining, edited by Lloyd Ulman (Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1967), p. 74.

14. Thomas R. Wildman, "The Legislation Necessary to Effectively Govern Collective Bargaining in Public Higher Education," Wisconsin Law Review, MCMLXXI (Autumn, 1971), p. 282.

15. Government Employee Relations Report, RF-1 sec. 51: 1011 *et seq.* (1972).

16. Harry T. Edwards, "An Overview of Meet and Confer -- Where are We Going?" Michigan Law School Law Quadrangle Notes, XVI (Winter, 1972), p. 10.

17. Public Employment Law, Cal. Govt. Code, secs. 3500-3511 (1971).

18. N.Y. Civil Service Law, secs. 200-212 (1971).

19. Public Employment Relations Law, Wests Wisc. Stat. Annt., secs 111.80-111.97(1972).

20. Wellington and Winter, "Limits of Collective Bargaining," p. 1123.

21. Vt. Stat. Annt., Chapt. 27, secs. 901-976 (1969).

22. Public Employment Relations Law, Title 7, Chapt. 89 (89-1--89-20), Hawaii Rev. Stat. (1971).

23. Public Employer-Employee Act, Purdon's Pa. Stat Annt., Title 643, secs. 1701-101--1701-2301 (1970).

24. Joel Seidman, "State Legislation on Collective Bargaining of Public Employees" Labor Law Journal, XXII (January, 1972), p. 37.

25. Wellington and Winter, "The Limits of Collective Bargaining," p. 1111.

26. Arnold M. Zack, "Ability to Pay in Public Sector Bargaining," N.Y.U. Twenty-Third Annual Conference on Labor (New York: Matthew Bender Co., 1971), p. 408.

27. For example, the National Labor Relations Act (Wagner Act) in Section 8 deals with unfair labor practices by the parties at the bargaining table. This section is a statutory control which sets up guidelines to ensure that the process of collective bargaining is both smooth and fair to both parties. This section, therefore, is not a restraint on collective bargaining, but is a conscious effort by the Congress to ensure a parity of power so that bargaining will be bileratal.

28. "Labor Problems in Public Employment," Northwestern Law Review, p. 117.

29. Gordon T. Nesvig, "The New Dimensions of the Strike Question," Public Administration Review, XXVIII (March, 1968), p. 130.

30. Connecticut Commission on Collective Bargaining in Municipalities, GERR No. 81 (March 29, 1965), p. D4.

31. "Summary of State Labor Laws," Government Employees Relations Report -- Reference File (1971), GERR-RF 51:501.

32. The Chronicle of Higher Education, May 15, 1972, p. 2.

33. Sands, "Role in Higher Education," p. 176.

34. AAHE Task Force Report, p. 2.

35. AAHE Task Force Report, p. 65.

36. Management rights clauses in contracts often give the employer a flexibility to deal with "managerial" matters otherwise unavailable due to statutory language.

37. The recommendations are directed towards two areas: (1) the general structuring of public employment relations statutes and (2) the specific statutory issues discussed in this study, i.e., exclusive representation, unit determination, and scope of bargaining. These recommendations are broad and flexible in nature, and are not inter-dependent. They are offered only as a first step in structuring public employment statutes. Where the line should be drawn between academic and non-academic issues, or the specific composition of bargaining units, for example, are issues for further discussion and study by all involved in the legislative process. They certainly are beyond the scope of this study. It must also be noted that, due to the diversity among states and educational institutions, particular structures within the framework of these recommendations will have to be developed. For that reason, the recommendations are flexible, allowing a legislature to choose from among them those most applicable to the particular situation in a given state.

38. Doherty and Oberer, "Teachers, School Boards, and Collective Bargaining," p. 60.

39. Gorman, "Statutory Responses to Collective Bargaining in Higher Learning," p. 14.

40. George Taylor, "Public Employment: Strikes or Procedures," in Report of Task Force on State and Local Government Labor Relations (Chicago, Ill: PPA, 1967), p. 46.

41. "Labor-Management Policies for State and Local Government," GERR-RF, GERR-RF 51:117.

42. Doherty and Oberer, "Teachers, School Boards and Collective Bargaining," p. 75

43. Chanin, Negotiations in Public Education, p. 14.

44. Livingston and Christensen, "State and Federal Regulation of Collective Negotiations in Higher Education," p. 105. It should also be noted that exclusive representation with individual bargaining rights, as outlined in the preceeding proposal, has been tried with some success in the state of Washington on its university campuses. Such limited experience, though not proving with total assurance the future success of the proposal, is sufficiently encouraging to merit further use in other states.

45. Although the statute should allow all-inclusive units it would be better not to have the actual units drawn in the statute. Accordingly, statutory policy would indicate legislative preference for such units. But, labor agencies and the parties themselves would be free to draw different unit structures if there were sufficiently compelling reasons. An excellent discussion of the Connecticut Teachers Statute, which follows this policy approach, is found in Robbins Barstow, "Connecticut's Teacher Negotiation Law: An Early Analysis," Phi Delta Kappan, LXI (March, 1966), p. 349.

46. The question of exactly which issues should, and should not be negotiable, is beyond the scope of this study. As will be noted in the following recommendation, the line should normally be drawn between the academic and non-academic issues.

47. Although it is possible to draw general distinctions between issues considered academic and non-academic in nature, the structure of institutions of higher education make particular distinction often difficult to recognize. For this reason, the author has suggested that a number of parties be included in the policy formulation of which items should, and should not, be excluded from the bargaining table. The input from these various interested

47. parties will allow the distinctions to be drawn along a much more rational pattern. It must be recognized, though, that distinguishing between these matters may still be, in fact, quite arbitrary.

Also, statutes which distinguish between academic and non-academic issues for bargaining purposes, must provide clear directives to any administrative tribunal on how the distinctions, in cases not covered by the statute, are to be formulated. This is also consistent with the recommendation on specialized administrative machinery.

48. As the recommendations indicate, the author has opted for neither the shared authority or collective negotiations approach to bargaining in higher education. Rather, the recommendations are directed toward establishing clarity and uniformity in light of educational considerations. But, an examination of the two models has served as one of the vehicles in identifying the proposed recommendations. Therefore, if a legislature, as a matter of policy, decided to adopt either the shared authority or collective negotiations model, this study should prove helpful because both approaches were discussed within the context of many of the issues involved in collective bargaining in higher education.